

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

911 MANAGEMENT, LLC, a	)	
Washington Limited Liability	)	
Company,	)	
	)	No. CV-08-47-HU
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES of AMERICA,	)	FINDINGS & RECOMMENDATION/
	)	ORDER
Defendant.	)	
	)	

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1 - FINDINGS & RECOMMENDATION/ORDER

1 HUBEL, Magistrate Judge:

2 Plaintiff 911 Management, LLC, a Washington limited liability  
3 company, brings this wrongful levy action against the United  
4 States. Both sides move for summary judgment. I recommend that  
5 911 Management's motion be denied, and that defendant's motion be  
6 granted. 911 Management also moves to strike several assertions of  
7 fact in defendant's Concise Statement of Fact (CSF), and associated  
8 underlying documents. I deny the motion to strike in part and deny  
9 it as moot in part.

10 BACKGROUND

11 This case involves three levies, totaling approximately  
12 \$198,689, made by the Internal Revenue Service (IRS) in 2007  
13 against 911 Management's bank account at U.S. Bank. The IRS levies  
14 were made to collect federal income taxes owed by Tom and Kathy  
15 Weathers for tax year 1996. The IRS asserts that 911 Management is  
16 the nominee or alter ego of Tom and Kathy Weathers.

17 In February 1990, Tom and Kathy Weathers entered into a lease  
18 relating to the Kent Hotel, located in Portland. Deft Exh. 29.  
19 Id. at p. 1. Tom and Kathy Weathers, as tenants, were to operate  
20 the Kent Hotel and were obligated to make lease payments to  
21 landlord Georgia Katchis. Id. at p. 2. Tom and Kathy Weathers are  
22 still parties to a lease agreement for the Kent Hotel and the  
23 current landlord is Katchis, LLC.

24 The Weatherses have a second lease agreement for the Joyce  
25 Hotel, also located in Portland. The most recent lease agreement  
26 for the Joyce Hotel was entered into on March 1, 2003, between Tom  
27 and Kathy Weathers as Lessees and D.Z. Real Estate as Lessor. Deft  
28 Exh. 26. Under the terms of the lease, Tom and Kathy Weathers have

1 the right to operate the Joyce Hotel and they are obligated to make  
2 payments to the Lessor. Id.

3 On their 1993, 1994, 1995, and 1996 federal personal income  
4 tax returns, Tom and Kathy Weathers reported income received from  
5 operating the Kent and Joyce Hotels. Deft Exhs. 36-39; Tom  
6 Weathers Depo. (Deft Exh. 51) at pp. 16-19, 22-25. On those same  
7 personal income tax returns for 1993 through 1996, Tom and Kathy  
8 Weathers also reported rents received from several properties they  
9 owned in Longview and Kelso, Washington.

10 In July 1998, the Weatherses filed an amended income tax  
11 return for the 1996 tax year. Deft Exh. 39. There, they  
12 represented that they owed no federal income taxes for that year,  
13 although their original return for 1996 showed they owed more than  
14 \$107,000 in taxes. Id. (Line 10, Column C); Deft Exh. 38 (Line  
15 62). Tom Weathers filed an attachment to the 1996 amended return  
16 in which he made the following statements: (1) "I know that no  
17 section of the Internal Revenue Code establishes an individual or  
18 personal 'income tax' liability applicable to me"; (2) "[t]here is  
19 no requirement in the [Internal Revenue Code or the Regulations  
20 thereunder] requiring me to file [sic] a 1040 Income Tax Return";  
21 (3) "I am a non-resident to the state of the forum of United States  
22 tax laws"; and (4) "I . . . swear under penalty of perjury that I  
23 have earned zero income for 1996 and all previous years." Deft  
24 Exh. 39 (Bates Stamp 149142-43).

25 On September 1, 2004, Tom and Kathy Weathers were indicted on  
26 six counts of federal criminal tax violations. Deft Exh. 44. A  
27 superseding indictment regarding the violations, including evasion  
28 of payment of tax for 1996, was filed on October 27, 2004. Deft

1 Exh. 45.

2 The superseding indictment sets forth seven acts of alleged  
3 tax evasion by the Weatherses, three of which are particularly  
4 relevant here: (1) they "plac[ed] jointly owned personal  
5 properties in the names of nominees to conceal [their] ownership of  
6 such properties from the IRS"; (2) they "jointly owned personal  
7 properties in the names of nominees to conceal [their] ownership of  
8 such properties from the IRS"; and (3) they "open[ed] bank accounts  
9 in the names of nominees and deposit[ed] funds into such accounts,  
10 beginning in about October 1998 and continuing through at least  
11 June 2004, in order to conceal [their] ownership of the funds from  
12 the IRS." Id.

13 On June 28, 2005, Tom and Kathy Weathers were convicted on all  
14 six counts in the superseding indictment, resulting in convictions  
15 for one count of evasion of payment of tax for tax year 1996, and  
16 five counts of failure to file tax returns for the years 1998  
17 through 2002. Deft Exh. 47. On September 29, 2005, Kathy Weathers  
18 was sentenced to two years of probation. Deft Exh. 7. The terms  
19 of her probation required that she pay restitution for tax year  
20 1996, in the amount of \$103,117. Id. On October 14, 2005, Tom  
21 Weathers was sentenced to sixty months in prison for the tax  
22 convictions. Deft Exh. 6. He was also required to pay restitution  
23 for the tax year 1996 in the amount of \$103,117. Id.

24 On October 25, 2005, a written application to form 911  
25 Management, LLC was filed with the Washington Secretary of State's  
26 Office. Deft Exh. 3. The address for 911 Management is listed as  
27 201 Orchard Street, Leavenworth, Washington. Id. Bryce W. Townley  
28 executed the certificate. Id. His address was the same as the

1 LLC's. Id. The registered agency for the LLC was listed as "B &  
2 C Townley, LLC," with the same address as 911 Management, LLC. Id.

3 Schedule A of the Operating Agreement for 911 Management, LLC  
4 shows 911 Management to have three "members": T&K Weathers, LLP  
5 (25%), Kathy Weathers (35%), and "Club Ed, Unincorporated  
6 Association" (40%). Deft Exh. 8 at p. 13. The addresses for Kathy  
7 Weathers and Club Ed are the same. Id.

8 Tom and Kathy Weathers are the general partners of T&K  
9 Weathers, LLP, which was formed on March 27, 1996. Deft Exh. 1.  
10 There are five limited partners: (1) the "Thomas D. Weathers and  
11 Kathy J. Weathers Family Trust, UA DTD February 26, 1996"; (2)  
12 "Brian D. Weathers Irrevocable Trust, UA DTD March 21, 1996"; (3)  
13 "Katie B. Weathers Irrevocable Trust, UA DTD March 21, 1996"; (4)  
14 Kayla D. Weathers Irrevocable Trust, UA DTD March 21, 1996"; and  
15 (5) Bradley M. Weathers Irrevocable Trust, UA DTD March 21, 1996."  
16 Id. Brian Weathers, Katie Weathers, Kayla Weathers, and Bradley  
17 Weathers are the children of Tom and Kathy Weathers.

18 Tom and Kathy Weathers executed the partnership agreement for  
19 T&K Weathers, LLP as general partners, and also as Trustees of the  
20 limited partner family trust. Id. at p. 7. Daniel and Shirley  
21 Dent signed as limited partners, with each of them signing four  
22 times, but with no indication of what limited partner they were  
23 signing for. Id. at p. 8.

24 Club Ed is identified in Schedule A of 911 Management, LLC's  
25 Operating Agreement as an unincorporated association. According to  
26 Daniel Dent, the manager of 911 Management, Club Ed is an  
27 organization that provides educational benefits to its members.  
28 Deft Exh. 11 (Daniel Dent Depo.) at p. 47. Club Ed has paid

1 tuition for schooling and provided books and learning materials to  
 2 Katie Weathers, Kayla Weathers, David Maag, Bruce Carroll, and Tom  
 3 Weathers. Id. Dent testified that these persons were the  
 4 "members" of Club Ed. Id. at p. 48.

5 Additional facts are discussed below.

#### 6 STANDARDS

7 Summary judgment is appropriate if there is no genuine issue  
 8 of material fact and the moving party is entitled to judgment as a  
 9 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the  
 10 initial responsibility of informing the court of the basis of its  
 11 motion, and identifying those portions of "'pleadings, depositions,  
 12 answers to interrogatories, and admissions on file, together with  
 13 the affidavits, if any,' which it believes demonstrate the absence  
 14 of a genuine issue of material fact." Celotex Corp. v. Catrett,  
 15 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

16 "If the moving party meets its initial burden of showing 'the  
 17 absence of a material and triable issue of fact,' 'the burden then  
 18 moves to the opposing party, who must present significant probative  
 19 evidence tending to support its claim or defense.'" Intel Corp. v.  
 20 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)  
 21 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
 22 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
 23 designate facts showing an issue for trial. Celotex, 477 U.S. at  
 24 322-23. The substantive law governing a claim determines whether  
 25 a fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors  
 26 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

27 The court should view inferences drawn from the facts in the  
 28 light most favorable to the nonmoving party. Id. at 630-31. On

1 cross-motions for summary judgment, the court gives the nonmoving  
 2 party for each motion the benefit of all reasonable inferences.  
 3 Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff  
 4 Dept., 533 F.3d 780, 786 (9th Cir. 2008). Additionally, on summary  
 5 judgment, the court need not draw all possible inferences in the  
 6 nonmoving party's favor, but only all reasonable ones, and a  
 7 reasonable inference is one based on more than mere speculation,  
 8 conjecture, or fantasy. Villiarimo v. Aloha Island Air, Inc., 281  
 9 F.3d 1054, 1065 n.10 (9th Cir. 2002).

10 All reasonable doubts as to the existence of a genuine issue  
 11 of fact must be resolved against the moving party. Matsushita  
 12 Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).  
 13 However, summary judgment is mandated against a party who fails to  
 14 make a showing sufficient to establish the existence of an element  
 15 essential to that party's case, and on which that party will bear  
 16 the burden of proof at trial. Celotex, 477 U.S. at 322. In that  
 17 situation, there

18 can be no genuine issue as to any material fact, since a  
 19 complete failure of proof concerning an essential element  
 20 of the nonmoving party's case necessarily renders all  
 21 other facts immaterial. The moving party is entitled to  
 22 a judgment as a matter of law because the nonmoving party  
 23 has failed to make a sufficient showing on an essential  
 24 element of her case with respect to which she has the  
 25 burden of proof. The standard for granting summary  
 26 judgment mirrors the standard for a directed verdict  
 27 under Federal Rule of Civil Procedure 50(a). . . .

28 Id. at 322-32 (internal quotation omitted). Additionally, where  
 the record taken as a whole could not lead a rational trier of fact  
 to find for the nonmoving party, there is no "genuine issue for  
 trial." Matsushita, 474 U.S. at 586.

/ / /

7 - FINDINGS & RECOMMENDATION/ORDER

## DISCUSSION

## I. Applicable Law

## A. 911 Management's Claims

911 Management brings this action under 26 U.S.C. § 7426. The first three claims for relief are brought as to the three separate levies which defendant issued against 911 Management's bank account: April 16, 2007 (first claim), October 31, 2007 (second claim), and November 30, 2007 (third claim).

911 Management also brings a fourth claim for "Unlawful 'Nominee Levies' by Defendant upon Plaintiff's Property." Compl. at ¶¶ 51-70. 911 Management alleges that before assessing a tax against a taxpayer, the IRS is required to present the taxpayer with notice and an opportunity to dispute the proposed tax in a proceeding in the United States Tax Court. 26 U.S.C. § 6213(a). This is referred to as a "notice of deficiency." 26 U.S.C. § 6212. 911 Management alleges that no statute relieves defendant of the notice requirements where the defendant seeks to assess a tax liability against an alleged nominee or alter ego of a taxpayer. Compl. at ¶ 54. 911 Management asserts that before assessing a tax against 911 Management, even as an alleged nominee or alter ego of another person, defendant was required to issue a notice of deficiency to 911 Management. Id. at ¶ 55. 911 Management also alleges that before assessing the taxes at issue in its first three claims, defendant provided no notice of deficiency to 911 Management. Id. at ¶ 56. 911 Management further alleges that defendant was similarly obligated to provide 911 Management with notice that defendant intended to collect the tax forcibly by issuing to 911 Management a "notice of intent to levy." Id. at ¶¶



1 58-63 (citing 26 U.S.C. § 6330).

2 B. Wrongful Levy under 26 U.S.C. § 7426

3 26 U.S.C. § 7426 allows a third party (a party other than the  
4 delinquent taxpayer or the IRS), to challenge an IRS levy as  
5 "wrongful." Under IRS regulations, a levy is "wrongful," if it "is  
6 upon property in which the taxpayer had no interest at the time the  
7 lien arose or thereafter." 26 C.F.R. § 301.7426-1(b).

8 As explained in a 1997 decision by this Court:

9 When a taxpayer neglects or refuses to pay taxes,  
10 the IRS may place a lien in favor of the United States  
11 upon all property and rights to property belonging to the  
12 taxpayer. 26 U.S.C. § 6321. When a lien attaches to  
13 property it is subject to levy. 26 U.S.C. § 6331(a).  
14 Under certain circumstances, the United States may levy  
15 upon property held by a third party such as, when a third  
16 party trust or entity is the alter ego or nominee of a  
17 taxpayer who is indebted to the United States for past  
18 taxes and penalties, See Juris Trust Co. Ltd. V. United  
19 States, 1996 WL 784503 (E.D. Cal. 1996), when a trust or  
20 entity is a "sham", See United States v. Geissler, 1993  
21 WL 625535 (D. Idaho 1993), or when the third party's  
22 interest in the property derives from a fraudulent  
23 transfer by the taxpayer whose liabilities are at issue,  
24 See Loving Saviour Church v. United States, 728 F.2d  
25 1085, 1086 (8th Cir. 1984).

26 26 U.S.C. § 7426(a)(1) provides in part that: "If a  
27 levy has been made on property . . ., any person (other  
28 than the person against whom is assessed the tax out of  
which such levy arose) who claims an interest in . . .  
such property and that such property was wrongfully  
levied upon may bring a civil action against the United  
States . . .". To state a claim under § 7426, the  
plaintiff must show: 1) it has an interest in the  
property; and 2) the "property was wrongfully levied  
upon". 26 U.S.C. § 7426(a)(1). A levy is wrongful if it  
was placed upon property in which the delinquent taxpayer  
has no interest. Sessler v. United States, 7 F.3d 1449,  
1451 (9th Cir. 1993).

29 The plaintiff "has the initial burden of proving  
30 title to the levied property." Tri-State Equipment v.  
31 United States, 1997 WL 375264 at \*9 (E.D. Cal. 1997).  
32 Once the plaintiff meets this initial burden, "the United  
33 States must show that there is a nexus between the  
34 taxpayer and the property." Id. The United States may  
35 satisfy this burden by showing that a third party trust

or entity is the alter ego or nominee of a taxpayer who is indebted to the United States for past taxes and penalties, See Juris Trust Co. Ltd. V. United States, 1996 WL 784503 (E.D. Cal. 1996), a third party trust or entity is a "sham", See United States v. Geissler, 1993 WL 625535 (D. Idaho 1993), or the third party's interest in the property derives from a fraudulent transfer by the taxpayer whose liabilities are at issue, See Loving Saviour Church v. United States, 728 F.2d 1085, 1086 (8th Cir. 1984). "[T]he plaintiff bears the ultimate burden of proving that the property does not belong to the taxpayer." Tri-State Equipment, 1997 WL 375264 at \*9.

The Colby B. Foundation v. United States, No. CV-96-3073-CO, 1997 WL 1046002, at \*16-17 (D. Or. Oct. 22, 1997), aff'd, 166 F.3d 1217 (9th Cir. 1999); see also D & S Family Preservation Trust v. United States, 983 F. Supp. 926, 930 (D. Or. 1997) ("The plaintiff in a wrongful levy suit bears the initial burden of showing an interest in, or a lien on, e.g., legal title, in the levied upon property. . . . Once that showing is made, the burden shifts to the government to show a nexus between the taxpayer and the property. . . . The plaintiff, however, retains the ultimate burden of persuading the district court that the property which appears to belong to the taxpayer is actually his property") (citations omitted).

911 Management argues that the burden of proof on the "nexus" element resides with the government and does not shift back to 911 Management. In support, 911 Management relies on Flores v. United States, 551 F.2d 1169 (9th Cir. 1977), where the court held that the government has the burden of persuasion on the "nexus" issue. Id. at 1175. Because the government in Flores failed to introduce sufficient evidence supporting its claim that the money which had been seized belonged to the delinquent taxpayer, the court had no reason to expressly consider the issue of shifting the burden back

1 to the plaintiff upon the government providing sufficient evidence  
2 in support of its claim. See id. at 1176.

3 In a footnote, the Flores court noted that it was not faced  
4 with a situation in which the government meets its burden of  
5 demonstrating a nexus between the taxpayer and the seized property  
6 where the plaintiff makes a claim to the property "derivatively  
7 from the taxpayer, through gift or otherwise." Id. at 1176 n.8.  
8 The court stated that such a situation was different from the case  
9 before it, and that its holding was limited to a requirement that  
10 the government "trace the property to the taxpayer." Id.

11 Subsequently, in a 1984 decision, the Ninth Circuit remarked  
12 that in Flores, it held that the government had the burden of  
13 persuasion on the question of whether there was a nexus between the  
14 taxpayer and the seized property. Arth v. United States, 735 F.2d  
15 1190, 1193 (9th Cir. 1984). The court expressed that it had "no  
16 doubt" that the government met that burden in the case before it.  
17 Id.

18 The Arth court noted that Flores had "reserved the question of  
19 where the burden of proof lies once the government traces the  
20 property of the taxpayer and the third party makes a claim to the  
21 property derivatively from the taxpayer, through gift or  
22 otherwise." Id. at 1193. The Arth court was "faced with such a  
23 situation here." Id. In such a circumstance, the court held, the  
24 third party must "prove that property which appears to belong to  
25 the taxpayer is actually his." Id. The court reached this  
26 conclusion because on the "nexus" issue, the government will often  
27 have greater access to the facts than the third party, while in the  
28 situation of a derivative claim, the third party makes "a claim of

1 ownership which depends on facts that are peculiarly within his  
2 knowledge." Id.

3 911 Management contends that this case is governed by Flores  
4 and not Arth. The problem with 911 Management's argument, however,  
5 is that Flores does not require the shifting of the burden of  
6 proof, but only requires that the government carry the burden of  
7 persuasion on the nexus issue, and neither case provides the law  
8 regarding the burden of proof, or persuasion, once the government  
9 meets its burden on the nexus issue in a case not involving a  
10 derivative claim.

11 Moreover, contrary to 911 Management's argument, Judge  
12 Panner's decision in Morgan Overseas Bank, Ltd. v. United States,  
13 No. CV-84-797-PA, 1986 WL 10102 (D. Or. June 17, 1986), does not  
14 resolve the issue. There, Judge Panner noted that there was some  
15 question in the law as to whether the burden of showing the nexus  
16 element was ultimately on the plaintiff or the government. Id. at  
17 \*1. He first cited Valley Finance, Inc. v. United States, 629 F.2d  
18 162, 171 n. 19 (D. C. Cir. 1980), for the proposition that once the  
19 government meets its burden of showing the requisite nexus, the  
20 burden returns to the plaintiff who must show wrongfulness by a  
21 preponderance of the evidence. Id. Then, however, he noted that  
22 dictum in Flores and Al-Kim v. United States, 610 F.2d 576, 580  
23 (9th Cir. 1979), amended, 650 F.2d 944, 948 n.12 (9th Cir. 1981),  
24 indicated that the burden may remain with the government. Id.

25 Judge Panner then discussed Arth and Flores. Id. at \*2. He  
26 concluded that the case before him was governed by Arth because  
27 even though the plaintiff did not contend that it received the  
28 seized property derivatively from the taxpayer, the evidence

1 indicated that that is what had occurred. Id. at \*2. Thus, Judge  
2 Panner applied the standard for derivative property as articulated  
3 in Arth. Finally, after a review of the evidence and making  
4 findings of fact, he concluded that the evidence showed a close  
5 nexus between the plaintiff and the delinquent taxpayer. Id. at  
6 \*10. He explained that he would reach that result on the nexus  
7 element and make the same fact findings whether the burden rested  
8 on the plaintiff or the government. Id.

9 I agree with 911 Management that Flores governs this case, as  
10 far as it goes. After 911 Management makes its initial showing of  
11 an interest in the property, the burden of persuasion shifts to the  
12 government to show a nexus between the property and the taxpayer.  
13 Flores does not expressly answer the question of what occurs,  
14 absent a derivative claim to the property, once the government  
15 satisfies this burden. But, by holding that only the burden of  
16 persuasion shifts to the government on the nexus element, Flores  
17 impliedly holds that once the government meets its burden on that  
18 issue, the burden of persuasion shifts back to 911 Management and  
19 that ultimately, 911 Management bears the burden of proving that  
20 the property does not belong to the Weatherses.

21 Applying that principle to the cross-motions for summary  
22 judgment in this case, 911 Management, to prevail on its motion,  
23 must establish, in the end, that no reasonable juror could conclude  
24 that the money in the account levied upon belonged to the  
25 Weatherses. To avoid summary judgment in favor of the government,  
26 911 Management must establish that a reasonable juror could  
27 conclude that the money in the account did not belong to the  
28 Weathers. If 911 Management fails in this regard, summary judgment

1 must be granted to the government.

2 C. Nominee Law

3 State law controls the determination of whether an entity is  
 4 an alter ego or nominee. Colby B., 1997 WL 1046002, at \*20 (citing  
 5 Morgan Overseas Bank, 1986 WL 10102, at \*10). Although Oregon law  
 6 recognizes the nominee theory, it does not address the factors  
 7 necessary to determine whether an entity is the nominee of the  
 8 taxpayer. Id. Thus, as in Colby B., the court looks to the  
 9 nominee factors identified in Towe Antique Ford v. IRS, 791 F.  
 10 Supp. 1450, 1454 (D. Mon. 1992), aff'd, 999 F.2d 1387 (9th Cir.  
 11 1993) (affirming on alter ego issue, but declining to reach nominee  
 12 issue). Colby B., 1997 WL 1046002, at \*20; see also United States  
 13 v. Secapure, No. C 07-1050 THE, 2008 WL 820719, at \*7 (N. D. Cal.  
 14 Mar. 26, 2008) (noting that courts throughout the Ninth Circuit  
 15 rely on the Towe factors to determine nominee status).

16 The Towe factors are:

- 17 1) Whether the nominee paid no or inadequate consideration;
- 18 2) Whether the property was placed in the name of the nominee  
 19 in anticipation of litigation or liabilities;
- 20 3) Whether there is a close relationship between the  
 21 transferor and the nominee;
- 22 4) Whether the parties to the transfer failed to record the  
 23 conveyance;
- 24 5) Whether the transferor retained possession; and
- 25 6) Whether the transferor continues to enjoy the benefits of  
 26 the transferred property.

27 Towe, 791 F. Supp. at 1454.

28 The Colby B. court added four additional factors relevant to

1 the nominee analysis, although they were not articulated in Towe:  
2 (1) the source of the funds used to purchase the property; (2) the  
3 taxpayer's continued use of the property without payment of fair  
4 rental value; (3) the taxpayer's continued payment of maintenance  
5 charges and real estate taxes; and (4) the taxpayer's acts of  
6 holding himself out as the owner of the property. Colby B., 1997  
7 WL 1046002, at \*20.

8 Generally, a business holds an asset as a nominee for a  
9 taxpayer when the taxpayer maintains a beneficial interest and  
10 exerts control over the asset. See LiButti v. United States, 107  
11 F.3d 110, 119 (2d Cir. 1997). The court should consider the  
12 totality of the circumstances rather than single out the presence  
13 or absence of one particular factor. See Turk v. IRS, 127 F. Supp.  
14 2d 1165, 1167 (D. Mont. 2000) ("No factor can dispose of the issue  
15 itself, and no factor is necessarily required in order to find  
16 nominee status.").

#### 17 D. Alter Ego Law

18 As with the law regarding nominees, Oregon law controls the  
19 issue of alter ego. Wolfe v. United States, 806 F.2d 1410, 1411  
20 n.3 (9th Cir. 1986); Morgan Overseas Bank, 1986 WL 10102, at \*10.  
21 Oregon has recognized the alter ego theory, but it has not  
22 specifically addressed the issue in the tax context. Morgan  
23 Overseas Bank, 1986 WL 10102, at \*10.

24 In Towe, the Ninth Circuit discussed the alter ego theory  
25 under Montana law. Towe, 999 F.2d at 1391. It explained that in  
26 Montana, "no concrete formula exists under which a court will  
27 disregard the separate identity of the corporate entity." Id.  
28 (internal quotation omitted). The court then listed the following

1 factors as relevant to a finding of alter ego:

2 1) Whether the individual is in a position of control or  
3 authority over the entity;

4 2) Whether the individual controls the entity's actions  
5 without need to consult others;

6 3) Whether the individual uses the entity to shield himself  
7 from personal liability;

8 4) Whether the individual uses the business entity for his or  
9 her own financial benefit;

10 5) Whether the individual mingles his own affairs in the  
11 affairs of the business entity; and

12 6) Whether the individual uses the business entity to assume  
13 his own debts, or the debts of another, or whether the individual  
14 uses his own funds to pay the business entity's debts. Id. The  
15 court noted that these factors were not exclusive. Id. The court  
16 also suggested the alter ego determination depends on the facts and  
17 circumstances present in each case. Id.

18 In Valley Finance, a case cited by the Towe court on the issue  
19 of alter ego status, the court stated that an entity is an alter  
20 ego when it is so dominated by another so as to negate any separate  
21 entity distinction. Valley Finance, 629 F.2d at 171-172 (cited in  
22 Towe, 999 F.2d at 1391). The Valley Finance court explained that  
23 "control by the individual must be active and substantial, but it  
24 need not be exclusive in a hypertechnical or day-to-day sense. The  
25 test is a practical one, based largely on a reading of the  
26 particular factual circumstances." Id. at 172.

27 / / /

28 / / /



1 II. Discussion

2 A. Nominee Factors

3 Colby B. and Towe together provide ten factors to analyze to  
4 determine whether an entity is the nominee of a taxpayer.  
5 Importantly, as suggested by the cases cited above, the factors are  
6 flexible, meaning that in a case involving the seizure of cash in  
7 a bank account, as opposed to the seizure of real property, some of  
8 the factors may not be readily applicable. And, depending on the  
9 facts of the case, the factors as stated in Colby B. or Towe, may  
10 need to be rephrased. Finally, as recited above, the presence or  
11 absence of a particular factor is not dispositive.

12 1. Whether the Nominee Paid No or Inadequate  
13 Consideration

14 On September 28, 2007, 911 Management entered into written  
15 license agreements with Tom and Kathy Weathers regarding the  
16 operations at the Kent and Joyce Hotels. Deft Exhs. 12, 13. The  
17 agreements are identical, but for the individual hotel.

18 In the Joyce Hotel agreement, Tom and Kathy Weathers are  
19 defined as the Licensor and 911 Management, LLC is defined as the  
20 Licensee. Deft Exh. 12. The License Agreement initially states  
21 that the Weatherses, as Licensor, and 911 Management, as Licensee,  
22 have been operating under a "binding verbal, legal agreement" from  
23 January 1, 2006, with respect to the management and operations of  
24 the Joyce Hotel and that the parties desire to memorialize the  
25 prior agreement. Id. The parties recite that the written license  
26 agreement was delayed due to litigation between the Licensor and  
27 the United States. Id. The License Agreement then recites that  
28 the Licensee has managed and operated the Joyce Hotel pursuant to

1 the License Agreement since January 1, 2006, "including collection  
2 of all revenue and payment of all expenses." Id.

3 The License Agreement recites that Licensor (the Weatherses)  
4 entered into a lease agreement with DZ Real Estate, LLC, dated  
5 March 1, 2003, to occupy the premises at 322 S.W. Eleventh Ave in  
6 Portland, referred to as the Property, and to operate the hotel  
7 business known as the Joyce Hotel. Id. The parties expressly  
8 recognized that the License Agreement did not transfer rights and  
9 ownership in or to the lease, nor did the License Agreement assign,  
10 sublet, or cause an occupant change with the lease. Under the  
11 License Agreement, the Licensee may not enter into any contract,  
12 agreement, or commitment without prior written permission.

13 911 Management, as Licensee, confirmed that it (1) had a copy  
14 of the Operating Lease between the Weatherses and DZ Real Estate,  
15 (2) had read the Operating Lease, (3) agreed to use diligence and  
16 its expertise to insure that strict compliance with the Operating  
17 Lease was maintained, and (4) had a fundamental duty to manage and  
18 operate the hotel in a compliant manner to maximize rentals, sales,  
19 and profits. Id. at p. 2.

20 The Weatherses acknowledged and agreed that they would not  
21 interfere with the management and operations of the property,  
22 providing that the 911 Management maintained full compliance with  
23 the Operating Lease and the License Agreement. Id. at pp. 2-3.  
24 However, the termination provision states that the Weatherses, as  
25 Licensor, can terminate the License Agreement at any time without  
26 cause by providing notice to the Licensee in writing. Id. at p. 3.  
27 911 Management, as Licensee, has no corresponding right to  
28 terminate the License Agreement.

1 In the License Agreement, Kathy Weathers disclosed that she  
2 was a minority owner of 911 Management. Id. The License Agreement  
3 recites that she will assist 911 Management as directed by manager  
4 Dent, but that she would not control or direct any management,  
5 fiscal duties, or key operating activities of 911 Management. Id.

6 The License Agreement requires that 911 Management, as  
7 Licensee, pay the Weatherses, as Licensor, a fee equal to three-  
8 percent of the gross proceeds generated from operations, interest,  
9 late fees, sales, rentals and any and all other income derived from  
10 the property and/or hotel operations. Id. at p. 5. This fee was  
11 to be paid by the tenth day of each month. Id. The Licensee is  
12 directed to make the fee payment to Tom and Kathy Weathers unless  
13 otherwise directed by the Licensor. Id.

14 The License Agreement is signed by Tom and Kathy Weathers as  
15 Licensors, and by Dent for the Licensee. Id. at p. 8. An  
16 identical License Agreement between Tom and Kathy Weathers as  
17 Licensor and 911 Management as Licensee, regarding the operation of  
18 the Kent Hotel, was executed on the same day, by the same  
19 individuals. Deft Exh. 13.

20 911 Management also receives income from the management of  
21 several properties in Washington. The initial capital contribution  
22 to T&K Weathers, LLP, one of 911 Management's members, in 1996,  
23 included several properties owned by Tom and Kathy Weathers in  
24 Longview and Kelso, Washington. Deft Exh. 1. Schedule A of the  
25 T&K Weathers, LLP partnership agreement states that "[t]he  
26 following real estate subject to the encumbrances owed thereon to-  
27 wit: [list of seven properties.] The above-described real estate  
28 is hereby conveyed to said TK WEATHERS LIMITED PARTNERSHIP, with

1 Grantors retaining the obligation to personally pay all obligations  
2 thereon if any presently exist." Id.<sup>1</sup>

3 According to Dent, 911 Management manages the Longview and  
4 Kelso properties under an oral agreement with Tom Weathers, as  
5 general partner of T&K Weathers, LLP.<sup>2</sup> Deft Exh. 11 (Dent Depo.)  
6 at p. 68; see also Deft Exh. 51 (Tom Weathers Depo.) at p. 47 (any  
7 properties held by T&K Weathers are managed by 911 Management).  
8 911 Management receives income from the management of the  
9 Washington properties in exchange for paying the mortgages on those  
10 properties.

11 Tom and Kathy Weathers did not personally place money in 911  
12 Management's bank account. This is not a situation where a sales  
13 contract reveals the consideration paid for seized property. The  
14 money seized in 911 Management's bank account was there by virtue  
15 of two sets of agreements. The first set is the written License  
16 Agreements Tom and Kathy Weathers signed with 911 Management to  
17 operate the Kent and Joyce Hotels, which allowed 911 Management to  
18 collect the revenue from those enterprises. The second set is the  
19 oral agreements the Weatherses, as general partners of T&K  
20

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21 <sup>1</sup> All of the seven properties listed on Schedule A of the  
22 T&K Weathers, LLP Partnership Agreement as initial capital  
23 contributions, are properties which were noted as being owned by  
24 Tom and Kathy Weathers in their 1993-1996 tax returns as rental  
25 property. However, one property listed in Schedule A of the T&K  
26 Weathers Partnership Agreement is listed as 1003 Chesnut in  
Kelso, while the tax returns show that as 1006 Chesnut in Kelso.  
Also, the property in Schedule A at 2107 42nd Ave in Longview  
appears only in the 1995 and 1996 tax returns, not those for 1993  
and 1994.

27 <sup>2</sup> I make no determination as to whether the oral agreement  
28 for management of the Washington properties is subject to the  
statute of frauds.

1 Weathers, LLP, had with 911 Management under which 911 Management  
2 operated, and received revenue from, the Washington properties.  
3 Thus, the relevant inquiry for this case, under this factor, is  
4 whether 911 Management paid little or no consideration for the  
5 right to obtain the revenue from those Oregon hotels and Washington  
6 properties as a result of operating them.

7 911 Management reported gross receipts of \$1,379,749 on its  
8 2006 federal income tax return (IRS Form 1065, line 1(a)). Deft  
9 Exh. 9. It reported gross receipts of \$1,510,131 on its 2007  
10 federal tax return (IRS Form 1065, line 1(a)). Deft Exh. 10.  
11 According to Dent, 911 Management's sole source of income is the  
12 rental of rooms in the Kent and Joyce Hotels in Oregon, and the  
13 rental of the Washington properties. Dent Feb. 20, 2009 Affid. at  
14 ¶ 5.

15 Other than some vague entries in 911 Management's bank account  
16 records which may be deposits of income from the hotels or the  
17 Washington properties<sup>3</sup>, but which are not identified by either  
18 party as such (nor is there any citation to a particular page or  
19 entry in the more than seventy-page exhibit), there is no evidence  
20 in the record to show how much of the gross receipts listed on 911  
21 Management's 2006 and 2007 tax returns, is attributable to an  
22 individual piece of property. Thus, on this record, I cannot  
23

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24 <sup>3</sup> 911 Management's bank account records show fairly regular  
25 deposits of "Portland Inco..." E.g., Exh. B to Sellers Affid. at  
26 p. 33 (Jan. 17, 2006 deposits of \$4,714.30, and \$6,171.27), p. 56  
27 (Aug. 28, 2006 deposits of \$8,907.76, and \$5318.55). Neither  
28 party provides an explanation of the nature of these deposits.  
Without more, it would be inappropriate speculation to assume  
that they represent all gross proceeds of the Joyce and Kent  
Hotels.

1 discern how much gross income 911 Management obtained from its  
2 operation of only the Joyce Hotel, its operation of only the Kent  
3 Hotel, or its operation of any of the individual properties in  
4 Washington.

5 As a result, the record does not establish the amount  
6 represented by three-percent of the gross proceeds from the  
7 operation of the hotels. Thus, there is no way to evaluate whether  
8 the three-percent fee under the License Agreements for the Kent and  
9 Joyce Hotels was a fair bargain for 911 Management or the  
10 Weatherses. Additionally, plaintiff fails to put any evidence in  
11 the record to show how this three-percent fee compares to other,  
12 similar commercial license agreements.

13 Nor is it possible to compute the value of the oral agreement  
14 for the Washington properties. Again, the record does not show the  
15 amount of gross proceeds generated by those properties. It also  
16 does not show the amount 911 Management pays in mortgage payments  
17 on those properties. Thus, as with the hotels, the record does not  
18 allow the Court to evaluate the adequacy of consideration paid by  
19 911 Management, the alleged nominee here, for the right to obtain  
20 income from the hotels and the Washington properties.

21 Records from 1996, while not determinative, give some  
22 indication that the three-percent license fee under the hotel  
23 agreements, is wholly inadequate consideration. In 1996, the Joyce  
24 Hotel collected \$405,660 in rent. Deft Exh. 38 at Bates 010838.  
25 Three-percent of \$405,660 is \$12,129. Net income from the Joyce  
26 Hotel in 1996 is listed in the Weatherses' 1996 tax return as  
27 \$134,761. Id. Thus, if the License Agreement had been in place in  
28 1996, the Weatherses would have received \$12,169 from 911

1 Management, but would have given up \$134,761 in income in exchange,  
2 meaning they would have given up more than ninety-percent of the  
3 income from the Joyce Hotel.

4 As for the Kent Hotel, the gross rents for 1996 were \$195,353,  
5 three-percent of which is \$5,860.59. Deft Exh. 38 at Bates 010839.  
6 The net income for the property for that year was \$96,824. Id. If  
7 the License Agreement had been in place in 1996, the Weatherses  
8 would have received \$5,860.59 as the three-percent fee owed to  
9 them, but would have given up \$96,824 as net income, meaning they  
10 would have given up over ninety-three percent of the income from  
11 the Kent Hotel.

12 The evidence is insufficient to evaluate the adequacy of the  
13 consideration. The government has met its burden of showing a  
14 nexus between the income and the Weatherses because before 911  
15 Management formed, and before the inception of the agreements  
16 between 911 Management and the Weatherses as to the hotels, and the  
17 agreement between 911 Management and T&K Weathers, LLP as to the  
18 Washington properties, Tom and Kathy Weathers received the income  
19 from all of the properties which now generate the income received  
20 by 911 Management.<sup>4</sup>

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21  
22 <sup>4</sup> There is no tax return in the record for T&K Weathers,  
23 LLP. It is unclear exactly how income received by T&K Weathers,  
24 LLP was distributed among its general and limited partners.  
25 However, Tom and Kathy Weathers were the two general partners,  
26 and the Thomas Weathers and Kathy Weathers Family Trust is one of  
27 the limited partners. The other four limited partners are the  
28 irrevocable trusts in each of the Weatherses' children's names.  
At the time T&K Weathers, LLP was formed, in 1996, each of the  
children was still claimed as a dependent by Tom and Kathy  
Weathers on their individual tax return. Deft Exh. 1 (T&K  
Weathers, LLP Limited Partnership Agreement); Deft Exh. 38 (1996  
tax return of Tom and Kathy Weathers). Thus, Tom and Kathy

1 In the context of these motions, the government must show, on  
2 this issue, only a question as to whether the consideration was  
3 inadequate. The failure of evidence on the consideration issue is  
4 enough to raise such a question. That is, the lack of evidence as  
5 to what income each property generated and what the mortgage  
6 payments are for the Washington property, is enough to raise a  
7 question of inadequate consideration. The information in the  
8 record from 1996 further raises an issue of inadequacy. In  
9 contrast, 911 Management has to affirmatively show that the  
10 consideration was adequate, or at least raise an issue that it was  
11 adequate. The complete failure of evidence on this issue, an issue  
12 on which 911 Management ultimately bears the burden of proof, is  
13 insufficient to suggest that the consideration was adequate. Thus,  
14 this factor weighs in favor of the government.

15 2. Whether the Property was Placed in the Name of  
16 the Nominee in Anticipation of Litigation or  
Liabilities

17 The basis for the tax evasion conviction was the Weatherses'  
18 failure to pay income taxes on, and their efforts to conceal,  
19 income earned in 1996 from the hotel operations and other  
20 properties. As noted above, as part of their sentences, Tom and  
21 Kathy Weathers were ordered to immediately pay their still-  
22 outstanding 1996 income tax liability.

23 911 Management was created eleven days after Tom Weathers was  
24 sentenced. 911 Management and Tom and Kathy Weathers entered into  
25 oral agreements on January 1, 2006, just over two months after Tom

26 \_\_\_\_\_  
27 Weathers personally benefitted from income to T&K Weathers, LLP,  
28 regardless of how the money received by T&K Weathers, LLP was  
actually distributed.



1 Weathers was sentenced, under which 911 Management began to operate  
2 the Oregon hotels and collect the revenue from those operations.  
3 The oral agreements were reduced to writing in September 2007.

4 Defendant argues that the timing of 911 Management's creation  
5 shows that the Weatherses sought to continue their pattern of  
6 concealing their income from the IRS, despite their criminal  
7 convictions. At sentencing, the Weatherses knew they would be  
8 required to make payments of the already-assessed 1996 tax year  
9 liability, to file tax returns, to pay taxes for future years, and  
10 to report their income to the IRS as part of their sentences. The  
11 properties which produced the 1996 income which the Weatherses took  
12 affirmative steps to conceal from the IRS, and on which they failed  
13 to pay taxes and now owed as part of a criminal restitution  
14 judgment, were the same properties which 911 Management operated  
15 under agreements with the Weatherses.

16 911 Management responds that the undisputed facts are that  
17 Coral Management formerly managed the properties now managed by 911  
18 Management. During his criminal trial, Tom Weathers met Jeff  
19 Townley who recommended that a new "business structure" be  
20 implemented for management of the properties, because of Tom  
21 Weathers's impending incarceration. 911 Management contends that  
22 Jeff Townley did nothing more than overhaul a "unitary corporate  
23 structure" and replace it with a "modern LLC structure." Because  
24 businesses are restructured every day, the fact that 911 Management  
25 was formed when it was is not a basis to disregard 911 Management's  
26 separate existence and its ownership of its property.

27 911 Management notes that the question in this factor is  
28 whether "the property" was placed in 911 Management's name in

1 anticipation of litigation or liabilities. 911 Management argues  
2 that the property here is its bank account. 911 Management further  
3 argues that the money was not placed in 911 Management's bank  
4 account by the Weatherses. Rather, according to 911 Management, it  
5 was earned by 911 Management as a result of its operation of the  
6 properties. Thus, 911 Management argues, the revenue cannot be  
7 characterized as having been placed in the bank account in  
8 anticipation of litigation or liabilities.

9 911 Management's argument ignores the facts of the case and is  
10 an unjustifiable attempt to narrow the Court's focus. The relevant  
11 facts here are that (1) the Weatherses had a history of non-payment  
12 of taxes on income derived from the Oregon hotels and Washington  
13 properties; (2) they had recently been convicted of tax evasion for  
14 1996; (3) they owed taxes on their 1996 income as part of a  
15 criminal judgment; (4) 911 Management was created only eleven days  
16 after Tom Weathers was sentenced; (5) the oral agreements under  
17 which 911 Management was to begin receiving the revenue from the  
18 Oregon hotels were entered into only two and one-half months after  
19 Tom Weathers was sentenced; and (6) the revenue obtained by 911  
20 Management under the hotel agreements and the oral agreement  
21 regarding the Washington properties, is the same revenue which  
22 produced the 1996 income upon which the Weatherses' 1996 income tax  
23 assessment was based.

24 The evidence shows that the Weatherses created 911 Management  
25 and then entered into agreements under which income previously  
26 received by the Weatherses, would now be received by 911  
27 Management. The evidence shows that the Weatherses did so shortly  
28 after their convictions and sentencings for criminal tax evasion of

1 \$103,117 for tax year 1996 (Count 1 of the superseding indictment),  
2 and for which their Judgments of Conviction, filed on the  
3 Weatherses' respective sentencing dates, included an order of  
4 restitution requiring payment of that \$103,117 to the IRS's  
5 Collection Division. A reasonable juror could reach only one  
6 conclusion based on these facts: the Weatherses acted in  
7 anticipation of the collection of the 1996 tax liability.

8 3. Whether There is a Close Relationship Between  
9 the Transferor and the Nominee

10 Defendant argues that all ownership interests in 911  
11 Management can be traced back to the Weatherses. The record  
12 supports defendant's argument.

13 The three members of 911 Management are Kathy Weathers, T&K  
14 Weathers, LLP, and Club Ed. Tom and Kathy Weathers are the general  
15 partners of T&K Weathers, and all the limited partners are linked  
16 to the Weathers family. It is undisputed that Tom Weathers makes  
17 the decisions for T&K Weathers, LLP. Tom Weathers Depo. (Deft Exh.  
18 51) at p. 34.

19 According to Dent, Club Ed's members are anyone that Club Ed  
20 makes a payment to, or on behalf of, and of the five such  
21 individuals he named, three are members of the Weathers family.  
22 The others are Tom Weathers's cellmate (Carroll), and Dent's nephew  
23 (Maag). Dent has been a close personal friend of the Weatherses  
24 for more than twenty years and is the godfather of the Weathers  
25 children. Club Ed uses the same address as Kathy Weathers and has  
26 no bank account of its own. It does not make its own "member  
27 distributions." Instead, 911 Management makes payments to third  
28 parties on behalf of Club Ed or its members.

1        911 Management argues that the presence of Club Ed is  
2 dispositive evidence of a "lack of closeness." 911 Management  
3 relies on the testimony of Jeff Townley who indicated that while  
4 Dent makes recommendations on the distributions to or on behalf of  
5 Club Ed members, and executes those distributions, the final  
6 decisionmaker is actually Jeff Townley. Because there is no  
7 evidence, argues 911 Management, that Jeff Townley is controlled by  
8 the Weatherses, there is no evidence that the Weatherses control  
9 Club Ed. 911 Management adds that should Club Ed be dissolved,  
10 neither the Weatherses, nor any other individual, will have an  
11 interest in Club Ed's assets.

12        The evidence undermines 911 Management's argument. First,  
13 putting Club Ed aside, the undisputed evidence is that Kathy  
14 Weathers has a thirty-five percent interest in 911 Management and  
15 T&K Weathers, LLP has an additional twenty-five percent interest in  
16 911 Management. As noted earlier, T&K Weathers, LLP's general  
17 partners are Tom and Kathy Weathers, and their family trust is one  
18 of the limited partners. Trusts for each of their four children  
19 comprise the remaining limited partners. Thus, even with no  
20 consideration of Club Ed, Tom and Kathy Weathers have a close  
21 relationship to 911 Management.

22        Second, the facts regarding Club Ed support only one  
23 reasonable inference: Club Ed and Tom and Kathy Weathers have a  
24 close relationship, underscoring the closeness of the relationship  
25 between 911 Management and Tom and Kathy Weathers. Dent, Club Ed's  
26 manager, is closely tied to the Weatherses. Weathers family  
27 members comprise the majority of the recipients of Club Ed  
28 distributions. A cellmate of Tom Weathers's and Dent's nephew are

1 the only other recipients of Club Ed monies. While there is a  
2 dispute between Dent's testimony and Jeff Townley's testimony about  
3 who is the final decisionmaker for Club Ed distributions, it  
4 appears undisputed that Townley has never failed to follow Dent's  
5 recommendations in that regard. And, both of these decisionmakers  
6 have ties to Tom Weathers, one by being a close family friend for  
7 many years and the appointed manager of 911 Management, the other  
8 being a business advisor to Tom Weathers. Finally, the record  
9 fails to establish that Club Ed has any assets, so the fact that  
10 the Weatherses would have no ownership interest in Club Ed assets  
11 upon dissolution of Club Ed, is meaningless. Whatever else Club Ed  
12 may be, the record shows it is nothing more than a funnel through  
13 which money passes to people with a close relationship to Tom and  
14 Kathy Weathers.

15 This factor weighs heavily in favor of the government.

16 4. Whether the Parties to the Transfer Failed to  
17 Record the Conveyance

18 This factor is aimed at examining whether the parties formally  
19 adhered to certain recordkeeping practices in executing their  
20 transaction. In this case, the legitimate, separate identity of  
21 911 Management cannot be measured by a recorded conveyance or  
22 written contract of sale because there was no transfer of land or  
23 other item of tangible property. While there are some written  
24 agreements (the written Operating Agreement for 911 Management and  
25 the written License Agreements for the hotels), there is no written  
26 conveyance record or sales contract evidencing an arms-length  
27 transaction.

28 However, there is evidence as to 911 Management's

1 recordkeeping practices in various instances. This evidence is  
2 relevant to the inquiry regarding the legitimacy of the transaction  
3 between the alleged nominee and the taxpayer.

4 911 Management states that its bank transactions are recorded  
5 in its bank account statements and canceled checks. While this  
6 appears to be the case, see Exh. B to Sellers Affid. at pp. 33-105,  
7 there are instances in which 911 Management's recordkeeping is  
8 sloppy or inaccurate, as discussed below. I separately discuss the  
9 different instances of allegedly poor recordkeeping, after which I  
10 reach a conclusion about the recordkeeping evidence.

11 a. Promissory Notes

12 The record contains copies of nine promissory notes, all  
13 evidencing transfers of money by 911 Management to a Weathers  
14 family member, with the Weathers family member promising to repay  
15 the money under the terms of the note. Exh. B to Sellers Affid. at  
16 pp. 106-31. One note is dated October 12, 2006, id. at pp. 115-17,  
17 and the rest are dated at various times in 2007. Id. at pp. 106-  
18 14, 117-30.

19 In November 2007, Jeff Townley sent an email to Dent attaching  
20 two of the promissory notes. Deft Exh. 65. Jeff Townley states  
21 that one was for Bradley Weathers who borrowed \$2,800 "last  
22 January." Deft Exh. 65.<sup>5</sup> Jeff Townley further states that he was  
23 told that Bradley Weathers could not make more than a \$100 per

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24  
25 <sup>5</sup> The record contains a copy of a promissory note executed  
26 by Bradley Weathers in favor of 911 Management for \$2,800. Exh.  
27 B to Sellers Affid. at pp. 106-08. It states that monthly  
28 payments were to begin on December 1, 2007, along with the first  
interest payment of \$99.48. Id. The term of the note was thirty  
months. Id. A handwritten note at the bottom of the last page  
of the note states "Paid \$250 2/13/08." Id.

1 month payment and Townley did not know what the terms were or if  
2 Bradley Weathers had started repaying the loan. Id. Townley set  
3 the interest rate at five-percent (which he describes as "quite low  
4 for a car"), and the monthly payment at \$99.48/month, making it a  
5 thirty-month loan. Id. He tells Dent that

6 [i]f [Bradley Weathers] has not started yet, you can fill  
7 in the date when he ought to start and treat the time  
8 from when he received the money until when he begins to  
9 repay as a grace period. If he has already started the  
pay-back, fill in the date so as to reflect when he began  
to repay.

10 Id.

11 The other promissory note Jeff Townley refers to is one by Ron  
12 King, identified by Dent as Katie Weathers's husband. Deft. Exh.  
13 65; Dent Depo. at p. 169.<sup>6</sup> Jeff Townley states that "[t]he other  
14 note is for Ron King. I just made it a simple interest 4% loan due  
15 15 days after he receives his refund. Call me or e-mail if you  
16 have any questions." Id. He then states that "[b]oth notes are in  
17 Word so you can change them as you need to and use the note as a  
18 template if you need to create additional notes - or just call me  
19 and I will." Id.

20 On January 30, 2008, Dent sent an email to Jeff Townley in  
21 which Dent stated "[i]f I am to testify [at the February 8, 2008

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22 <sup>6</sup> The record contains a copy of a note from King to 911  
23 Management, for \$2,500. Exh. B to Sellers Affid. at pp. 129-31.  
24 The term of the note was "until such time as Ron King receives  
25 the expected tax refund for the tax year 2006." Id. The note,  
26 plus \$100 interest was due and payable fifteen days from the date  
27 King received his expected tax refund. Id. After that, interest  
28 was to accrue at four-percent. Id. Handwritten notes at the  
bottom of the third page of the note state that \$50 was paid on  
February 13, 2008, \$2,500 was paid on May 7, 2008, and \$78.81 was  
paid on July 15, 2008. Id. This is followed by a note which  
states: "Paid in Full D. Dent." Id.

1 hearing on 911 Management's motion for preliminary injunction in  
2 the instant case], we need to get all of our ducks in order. I  
3 have signed promissory notes for three loans but there are a number  
4 of others we need promissory notes for." Deft Exh. 56.

5 Dent does not identify the three loans for which he had  
6 promissory notes, but he does list several for which he needs  
7 promissory notes. Id. The formatting of the email makes it  
8 difficult to understand which member of the Weathers family  
9 obtained the monies from 911 Management. Id. at p. 3. There are  
10 four names: Kayla, Kathy, Bradley, and Katie. Id. There is also  
11 one entry which states "Financial Awareness (for Brian)." Id.  
12 There are a total of fourteen separate amounts indicated. Id.

13 Townley and Dent created promissory notes after the fact. The  
14 government argues that these transfers of money from 911 Management  
15 to members of the Weathers family are nothing more than gifts,  
16 evidencing that 911 Management's bank account is nothing more than  
17 a personal bank account for the Weathers family.

18 911 Management does not dispute that promissory notes were  
19 backdated. 911 Management argues, however, that this is standard  
20 practice for small businesses. 911 Management asserts that it  
21 considered the loans as assets, in accordance with generally  
22 accepted accounting principles, and were reported to the IRS as  
23 loans. In support, 911 Management cites to its 2006 and 2007 tax  
24 returns.

25 In "Statement 3" to 911 Management's 2006 partnership tax  
26 return, 911 Management lists \$8,500 in loans. Deft Exh. 9 at p.  
27 14. Although there is no further explanation of this sum in the  
28 record, I assume for the purposes of this motion, that this



1 includes the \$8,000 loan to Kathy Weathers purportedly made on  
2 October 12, 2006. I make this assumption because of the nine  
3 promissory notes in the record, only this one is from 2006. There  
4 is no explanation by 911 Management of the additional \$500 in loans  
5 claimed in its 2006 tax return.

6 In "Statement 3" to 911 Management's 2007 partnership tax  
7 return, 911 Management lists \$8,500 in loans at the beginning of  
8 the year, but \$221,908 at the end of the year. Deft. Exh. 10 at p.  
9 14. There is no explanation for how the \$221,908 was calculated.  
10 This figure is significantly higher than the approximate \$17,340  
11 total of the eight notes in the record which were executed in 2007.  
12 Exh. B to Sellers Affid. at pp. 106-14, 117-30.

13 I agree with 911 Management that simply backdating a  
14 promissory note does not prove that a transfer of money was not a  
15 loan. However, the evidence here shows that in addition to the  
16 backdating, many of the notes are unsigned by the borrower, the  
17 majority have not been paid back, and all are to Weathers family  
18 members. Additionally, the amount of loans shown in 911  
19 Management's tax returns bears no correlation to the nine  
20 promissory notes in the summary judgment record. And, the  
21 recordkeeping of any repayment is quite informal, consisting of  
22 some handwritten notes, some acknowledged to have been written by  
23 Dent. Moreover, many of the alleged repayments occurred after this  
24 lawsuit was filed. Finally, 911 Management submits no evidence in  
25 support of its assertion that creating promissory notes after the  
26 fact is a common small business practice.

27 b. Payments to, or on behalf of, the Weathers

28 Defendant cites to several payments to or on behalf of the

1 Weatherses, and inaccurate records surrounding those payments, as  
2 evidence that 911 Management is the nominee of the Weatherses. I  
3 address them in turn.

4 i. Lease Payments for Oregon Hotels

5 Defendant notes that 911 Management deducts as its own  
6 expenses the payments 911 Management makes on the Oregon hotel  
7 leases, which, based on the underlying leases, the Weatherses are  
8 personally obligated to pay. Deft Exh. 14 (Dec. 29, 2006 check  
9 #5938 from 911 Management to Katchis, LLC, lessor of the Kent  
10 Hotel, for \$4,700; Dec. 29, 2006 check #5939 from 911 Management to  
11 DZ Real Estate, LLC, lessor of the Joyce Hotel, for \$6,473.53);  
12 Deft Exhs. 9 & 10 (2006 and 2007 tax returns for 911 Management  
13 showing deductions for rent); Exh. B to Seller's Affid. at p. 68  
14 (account entries in "register report" for 911 Management's bank  
15 account, on December 29, 2006, for check #5938 to Katchis, LLC for  
16 the Kent Hotel lease payment for \$4,700, and for check #5939 to DZ  
17 Real Estate for the Joyce Hotel lease payment for \$4,498.66<sup>7</sup>).

18 Defendant's point here is that by paying the personal  
19 obligations of the Weatherses, 911 Management ceases to be a  
20 separate entity, and by deducting the expense on its tax returns,  
21 911 Management inappropriately treats a payment owed by the  
22 Weatherses as its own business expense, further blurring the line  
23 between 911 Management and the Weatherses.

24 911 Management argues that "[a]ll of the license fees paid [by  
25 911 Management] to the Weathers, or directly to property owners on  
26

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27 <sup>7</sup> There appears to be a discrepancy between the amount  
28 reflected in the actual check and the account entry for check.

1 [the Weatherses'] behalf" are tax deductible because "[t]hese are  
2 license fees Plaintiff pays in order to be permitted to enter the  
3 properties and operate them for its own account." Pltf Reply Mem.  
4 at pp. 19, 20.

5 As noted above, the License Agreements expressly state that  
6 they do not transfer rights and ownership in the underlying hotel  
7 leases, and are not to be considered an assignment of the lease.  
8 Deft Exhs. 12, 13. They also provide, however, that 911 Management  
9 is to make any disbursements required in the leases. Id. And, the  
10 License Agreements recite that since January 1, 2006, 911  
11 Management had managed and operated the hotels, including payment  
12 of all expenses. Id. Thus, while the License Agreements appear to  
13 have made no transfer of the Weatherses' legal obligations under  
14 the leases to pay the rent on the hotels, they also indicate that  
15 911 Management assumed the responsibility of making the rent  
16 payment on behalf of the Weatherses. The fact that 911 Management  
17 made the rent payments on the Weatherses' behalf is not  
18 inconsistent with the License Agreements.

19 911 Management's characterization of the rent payments as  
20 license fees is, however, inconsistent with, and unsupported by,  
21 the record. The record establishes that the license fee paid by  
22 911 Management for its right to operate and manage the Oregon  
23 hotels, and to obtain the revenue therefrom, is three-percent of  
24 the hotels' gross revenue, and notably, is to be used for Kathy  
25 Weathers's living expenses.

26 In his deposition, Dent testified that under the hotel License  
27 Agreements, Tom Weathers's family receives three-percent of the  
28 gross revenue from the Joyce and Kent Hotels and that Tom Weathers

1 and Dent had an agreement that Tom Weathers's family would receive  
2 that money by 911 Management paying the living expenses of Kathy  
3 Weathers. Deft Exh. 11 (Dent Depo.) at pp. 86-87. The agreement  
4 included payments for Kathy Weathers's housing, auto expenses, auto  
5 and health insurance, and phone. Id. at pp. 87, 90. According to  
6 Dent, 911 Management usually writes a check directly to the third  
7 party, with the exception of the phone expense which Kathy Weathers  
8 paid herself, but was then reimbursed by 911 Management. Id. at p.  
9 88.

10 Additionally, since, as discussed above, there is no evidence  
11 in the record to show the gross proceeds of the Oregon hotels in  
12 2006 and 2007, and thus, no way to calculate three-percent of those  
13 proceeds, the Court cannot evaluate whether the rent payments to  
14 the hotels, plus the living expenses for Kathy Weathers, equal the  
15 three-percent to be paid to the Weatherses under the hotel License  
16 Agreements. 911 Management's assertion here that the rent payments  
17 are part of that license fee does not make it so.

18 911 Management's argument that the \$10,000 per month rent  
19 payments it makes on behalf of the Weatherses for the Oregon  
20 hotels, is part of the three-percent license fee it owes the  
21 Weatherses under the License Agreements, finds no support in the  
22 record. Its characterization of these rent payments as a license  
23 fee is thus undermined. 911 Management has described its license  
24 fee payments as payments of Kathy Weathers's living expenses. The  
25 rent payments for the hotels are in no way "living expenses of  
26 Kathy Weathers." Furthermore, while the entity operating the  
27 hotels may or may not be able to properly deduct the rent payments  
28 as some type of ordinary business expense, 911 Management fails to

1 show that it properly accounted for the lease payments as license  
2 fees and thus, its deductions of these payments on its income tax  
3 returns because they were license fees, is questionable.

4 ii. The Three-Percent License Fee

5 Defendant asserts, and 911 Management does not deny, that 911  
6 Management also deducts as its own expenses, the payments it makes  
7 for Kathy Weathers's housing and for her car repairs. Deft Exh. 16  
8 (June 1, 2006 check #5394 from 911 Management to "P.V.L, LLC" in  
9 Vancouver, Washington for "Weathers 4809 NE 109th St.," for  
10 \$1,800); Deft Exh. 17 (August 7, 2006 check #5572 from 911  
11 Management to Chrysler Financial, for \$704.72); Exh. B to Sellers  
12 Affid. at p. 48 (account entry showing check #5394 as payment to  
13 "P.V.L., LLC" for "Rent/4809 NE..." with "Weathers 48..." noted in  
14 the "memo" column, not noted as a member distribution or as three-  
15 percent license fee); Id. at p. 54 (account entry showing check  
16 #5572 as payment of "Auto:Loan/KA," not as a member distribution or  
17 payment of the three-percent license fee).

18 911 Management states that payments to partners in capacities  
19 other than partners, such as a licensor under a license agreement,  
20 are properly accounted for as transactions with "one who is not a  
21 partner" under Internal Revenue Code § 707(a)(1). 911 Management  
22 contends that it properly records on its books all of these  
23 payments and consistently reports them to the IRS.

24 911 Management's summary judgment record on this issue is  
25 incomplete. While the Internal Revenue Code may allow 911  
26 Management to consider the three-percent license fee it owes to Tom  
27 and Kathy Weathers by 911 Management under the License Agreements  
28 to be recorded as a transaction under section 707(a)(1) and

1 deductible as an ordinary business expense (an issue I do not  
2 decide in this case), the bank account records (as summarized by  
3 example above) do not denote the payments as such, calling into  
4 question the accuracy and truthfulness of such records.  
5 Additionally, while 911 Management's 2006 tax return shows a  
6 deduction for taxes and licenses in the amount of \$162,222, and the  
7 2007 tax return shows a deduction for taxes and licenses in the  
8 amount of \$125,202, 911 Management makes no attempt in this case to  
9 explain to the Court what portion of those deductions was for  
10 "licenses" as opposed to taxes, or to show that the deduction for  
11 licenses, whatever it was, was the total of the payments made for  
12 Kathy Weathers's living expenses, the only payment of the three-  
13 percent fee made by 911 Management according to Dent.

14 Furthermore, while 911 Management records funds it pays on  
15 behalf of the Weatherses in its books, Dent calculates the three-  
16 percent figure only once annually, when he files the tax returns.  
17 Deft Exh. 11 (Dent Depo.) at pp. 88-90. He automatically pays  
18 Kathy Weathers's living expenses, with no regard to whether the  
19 payments are above or below the three-percent figure. Dent assumes  
20 the amounts average out over a period of years. Id. In 2006,  
21 however, Dent thought that 911 Management paid Kathy Weathers more  
22 than the three-percent fee, but he never made an attempt to have  
23 her repay it. Id.

24 iii. Charitable Contributions

25 911 Management made several payments to Crossroads Community  
26 Church in 2006 and 2007. For example, on January 13, 2006, 911  
27 Management issued a check to Crossroads Community Church for  
28 \$2,200. Deft Exh. 52 (Jan. 13, 2006 check #5001). The memo

1 section of the check references "Tom & Kathy Weathers." Id. At  
2 the top of the check, there is a separate reference to "Account:  
3 TOM & KATHY WEATHERS." Id.<sup>8</sup> 911 Management's 2006 and 2007 tax  
4 returns show that 911 Management claimed deductions for charitable  
5 contributions in each of those years. Deft Exhs. 9, 10, at p. 3,  
6 line 13a, and p. 14 (showing a \$66,800 deduction in 2006, and an  
7 \$82,300 deduction in 2007).

8 Defendant argues that 911 Management's payment of a charitable  
9 contribution on behalf of Kathy Weathers should be treated as a  
10 distribution to Kathy Weathers and not as a contribution made by  
11 911 Management itself, and not as a deduction on 911 Management's  
12 income tax return. 911 Management argues that partnership  
13 charitable contributions are properly deducted at the partnership  
14 level, then apportioned among the partners according to their  
15 interests, and passed through to the partners in the Schedules K-1.  
16 911 Management argues that charitable contributions are not treated  
17 as direct distributions to any partner because no distribution to  
18 a member is made.

19 Defendant's argument is not addressed to charitable  
20 contributions that 911 Management itself actually made on 911  
21 Management's behalf. Rather, defendant argues that the check  
22

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23  
24 <sup>8</sup> While the record contains only one copy of an actual  
25 check, 911 Management's account records indicate that a similar  
26 check was issued regularly. E.g., Exh. B to Sellers Affid. at p.  
27 39 (Mar. 10, 2006 check to "Crossroads" for \$2,000 with the Memo  
28 noted as "Tom & Kathy" and the Category noted as "Contribution");  
p. 42 (same, but dated April 12, 2006), at p. 46 (same, but dated  
May 11, 2006), at p. 64 (same, but dated Nov. 10, 2006), at p. 83  
(same, but dated May 10, 2007), at p. 93 (same, but dated Sept.  
10, 2007), at p. 103 (same, but dated Dec. 10, 2007).

1 issued to Crossroads Community Church in January 2006 with its  
2 multiple references to Tom and Kathy Weathers, including one which  
3 actually refers to Tom and Kathy Weatherses' account, is a personal  
4 contribution of the Weatherses that was made by 911 Management and  
5 inappropriately documented as having been 911 Management's  
6 contribution.

7 It is undisputed that there are multiple references to Tom and  
8 Kathy Weathers in connection with this contribution, including a  
9 reference to their account. 911 Management submits no evidence,  
10 other than the fact that the check was drawn on 911 Management's  
11 bank account, showing that this contribution was on behalf of 911  
12 Management as opposed to Tom and Kathy Weathers.

13 iv. Member Distributions

14 911 Management makes member distributions under Section IX of  
15 911 Management's Operating Agreement. Deft Exh. 8 at pp. 8-9.  
16 Dent testified at the preliminary injunction hearing that at the  
17 beginning of 911 Management's formation, he was confused about how  
18 to distribute money as member distributions to member Kathy  
19 Weathers. Exh. A to Sellers Affid (Dent Pre. Inj. Test.) at p. 12.  
20 He spoke to Jeff Townley who told him that 911 Management could  
21 write checks for medical bills and other bills and list those as  
22 member distributions to Kathy Weathers. Id. at pp. 12-13. He  
23 further described that "we kind of streamlined the process and  
24 turned her distribution into a once-a-month check" which was  
25 initially \$5,000 per month, but then changed to \$5,700 per month.



1 Id. at p. 13.<sup>9</sup>

2 In his deposition, Dent testified that he arrived at the  
3 \$5,700 per month figure after he told Jeff Townley the approximate  
4 amount of income that 911 Management earned each month. Deft Exh.  
5 62 (Dent Depo.) at pp. 59-60. Dent admitted that 911 Management's  
6 income varied every month, but he nonetheless paid Kathy Weathers  
7 the same \$5,700 payment each month. Id. He thinks he did  
8 calculations to show that the \$5,700 figure was an average, but he  
9 did not save his work. Id.

10 In support of its summary judgment motion, 911 Management  
11 asserts that recently, "the monthly member distributions have been  
12 \$5,700, which has been paid through direct disbursements to Kathy  
13 Weathers, and also through payments of living expenses on her  
14 behalf." Pltf CSF at ¶ 43. I note some inconsistency in this  
15 assertion. 911 Management has previously asserted, as noted above,  
16 that it pays Kathy Weathers's living expenses as part of the three-  
17 percent license fee under the Joyce and Kent hotel License  
18 Agreements. But here, 911 Management also asserts that some living  
19 expenses are paid as part of 911 Management's member distributions.

20 911 Management then asserts that "[i]n all cases, Dan Dent  
21

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22 <sup>9</sup> Dent's testimony at the preliminary injunction hearing in  
23 February 2008, and at his deposition in October 2008, was that  
24 the "streamlined" monthly membership distribution to Kathy  
25 Weathers was \$5,700. See Exh. A to Sellers Affid. (Dent. Pre.  
26 Ing. Test.) at p. 12; Deft Exh 62 (Dent Depo.) at p. 59 (noting  
27 that after a few months of payment certain expenses, 911  
28 Management arrived at a "set amount, just the 5,700 a month").  
911 Management's bank account records, as detailed more fully  
below, show, however, that the "set amount," streamlined monthly  
payments to Kathy Weathers were initially \$5,000 per month,  
changing to \$5,700 per month in March 2007. Exh. B to Sellers  
Affid.

1 recorded the payments to Kathy Weathers in Plaintiff's books and  
 2 records as member distributions to or for the benefit of Kathy  
 3 Weathers, in conformity with IRC §§ 704 and 731." Pltf CSF at ¶  
 4 44. In support of this, 911 Management cites to seventy-two pages  
 5 of its bank account records for all of 2006 and 2007, with no  
 6 discussion or reference to a particular page or particular entry.  
 7 Failure to cite to a particular page within an exhibit is an  
 8 unnecessary burden on the Court.

9 While the Court owes no duty to a party to comb through pages  
 10 of material to find the supporting information, my review of 911  
 11 Management's account records shows the following items recorded as  
 12 "member distributions" in 2006 and 2007:

13	January 18, 2006:	\$41.02 to "Waste Conne..."
14	January 19, 2006:	\$230 to "Southwest Wa..." for Tom Weathers
15	January 20, 2006:	\$196 to "Northwest Acu..." for Kathy Weathers
16	January 20, 2006:	\$195 to "Vancouver Ra..." for Kathy Weathers
17	January 20, 2006:	\$125.75 to Verizon Wireless for Kathy Weathers
18	January 23, 2006:	\$200 to "Cascade Hear..."
19	January 24, 2006:	\$80 to "Parking Services"
20	January 25, 2006:	\$107.66 to Comcast Cable for Kathy Weathers
21	January 26, 2006:	\$1,161.91 to American Express
22	January 25, 2006:	\$92.81 to Clark Public Utilities
23	January 26, 2006:	\$155 to "Firstmed East ..."
24	January 27, 2006:	\$229.40 to "Legacy Salmo..."
25	January 30, 2006:	\$323.73 to "Hudson Bay M..."
26	January 31, 2006:	\$41.02 to "Waste Conne"
27	February 1, 2006:	\$2,500 to Kathy Weathers
28	February 8, 2006:	\$2,500 to Kathy Weathers
	February 15, 2006:	\$287.77 to "Northwes..."
	February 16, 2006:	\$87.74 to Verizon Wireless
	February 21, 2006:	\$230 to "Southwest Was..." for Tom Weathers
	March 1, 2006:	\$2,500 to Kathy Weathers
	March 15, 2006:	\$2,500 to Kathy Weathers
	March 20, 2006:	\$230 to "Southwest Was..." for Tom Weathers
	March 30, 2006:	\$50.70 to "Vancouver Ra..."
	April 3, 2006:	\$5,000 to Kathy Weathers

1 April 19, 2006: \$230 to "Southwest Was..." for Tom  
 2 Weathers  
 3 May 1, 2006: \$5,000 to Kathy Weathers  
 4 May 19, 2006: \$230 to "Southwest Was..." for Tom  
 5 Weathers  
 6 June 1, 2006: \$5,000 to Kathy Weathers  
 7 June 19, 2006: \$230 to "Southwest Was..." for Tom  
 8 Weathers  
 9 June 23, 2006: \$3,606.58 to "Pro-tech"  
 10 June 27, 2006: \$5,000 to Kathy Weathers  
 11 July 21, 2006: \$230 to "Southwest Was..." for Tom  
 12 Weathers  
 13 Aug. 1, 2006: \$5,000 to Kathy Weathers  
 14 Aug. 18, 2006: \$230 to "Southwest Was..." for Tom  
 15 Weathers  
 16 Sept. 1, 2006: \$5,000 to Kathy Weathers  
 17 Sept. 19, 2006: \$230 to "Southwest Was..." for Tom  
 18 Weathers  
 19 Sept. 29, 2006: \$5,000 to Kathy Weathers  
 20 Oct. 19, 2006: \$230 to "Southwest Was..." for Tom  
 21 Weathers  
 22 Nov. 1, 2006: \$5,000 to Kathy Weathers  
 23 Nov. 20, 2006: \$230 to "Southwest Was..." for Tom  
 24 Weathers  
 25 Nov. 30, 2006: \$5,000 to Kathy Weathers  
 26 Dec. 19, 2006: \$230 to "Southwest Was..." for Tom  
 27 Weathers  
 28 Dec. 29, 2006: \$5,000 to Kathy Weathers  
  
 Jan. 19, 2007: \$230 to "Southwest Was..." for Tom  
 Weathers  
 Jan. 31, 2007: \$5,000 to Kathy Weathers  
 Feb. 16, 2007: \$230 to "Southwest Was..." for Tom  
 Weathers  
 March 1, 2007: \$5,000 to Kathy Weathers  
 March 8, 2007: \$700 to Kathy Weathers  
 March 19, 2007: \$230 to "Southwest Was..." for Tom  
 Weathers  
 March 28, 2007: \$209.41 to "Southwest Was..." for Tom  
 Weathers  
 March 30, 2007: \$5,700 to Kathy Weathers  
 June 25, 2007: \$5,700 to Kathy Weathers  
 July 31, 2007: \$5,700 to Kathy Weathers  
 Aug. 31, 2007: \$5,700 to Kathy Weathers  
 Sept. 28, 2007: \$5,700 to Kathy Weathers  
 Nov. 1, 2007: \$5,700 to Kathy Weathers  
 Nov. 15, 2007: \$5,700 to Kathy Weathers  
 Dec. 1, 2007: \$5,700 to Kathy Weathers

Exh. B to Sellers Affid. at pp. 33-38, 40-43, 45-46, 48-50, 52-53,  
 55, 57-59, 61, 63, 65-66, 67-68, 72-73, 75-79, 86, 89, 92, 95, 99,  
 101-02.

1       The records show, beginning in February 2006, monthly  
2 distributions of \$5,000 to Kathy Weathers, changing to \$5,700 in  
3 March 2007, with the exception of payments in approximately April  
4 and May 2007. The records show a regular payment of \$230 to  
5 "Southwest Was..." on behalf of Tom Weathers, an expense not  
6 fitting 911 Management's characterization of the member  
7 distributions being made to Kathy Weathers directly or for living  
8 expenses paid by 911 Management for Kathy Weathers's benefit. That  
9 expense is also not characterized as a payment to either of the  
10 other two of 911 Management's members (T&K Weathers, LLP or Club  
11 Ed). The records also show a variety of payments to other  
12 entities, the purpose of which, and for the benefit of which  
13 member, is unclear. Finally, and importantly, while the records  
14 support 911 Management's assertion that 911 Management recorded  
15 these entries as "member distributions," these account logs do not  
16 show, without more, that 911 Management acted "in conformity with  
17 IRC §§ 704 and 731."

18       Kathy Weathers admitted during her deposition that she  
19 receives the \$5,700 monthly distribution from 911 Management in  
20 cash because she does not use a bank account as a result of the IRS  
21 taking money from one if she used one. Deft Exh. 5 (Kathy Weathers  
22 Depo.) at pp. 40-41.

23       Defendant argues, essentially, that the fact that Dent makes  
24 the distributions based on a one-time educated guess using average  
25 income instead of basing the distribution on 911 Management's  
26 actual income, shows that 911 Management's income is tantamount to  
27 personal income for the Weatherses because Kathy Weathers receives  
28 the same distribution regardless of how the business is doing, and

1 with no ongoing assessment by the manager of whether the  
2 distribution is consistent with Kathy Weathers's thirty-five  
3 percent interest in 911 Management. Additionally, as defendant  
4 notes, Kathy Weathers admits taking the distributions in cash, to  
5 avoid reporting the income to the IRS.

6 911 Management argues that the positive balance in the capital  
7 accounts shows that the \$5,700 month 911 Management pays to Kathy  
8 Weathers, is less than what she is owed as member distributions.  
9 The first problem with this argument is that 911 Management's tax  
10 returns show nothing more than what 911 Management reported to the  
11 IRS and nothing more than a snapshot of the capital account as of  
12 a particular day. Thus, while there may be a positive balance in  
13 the capital account, without more in-depth accounting records  
14 demonstrating the basis for all the figures in the tax returns, the  
15 tax returns themselves show very little.

16 The second problem is that the information that is contained  
17 in the record raises more questions than it answers. 911  
18 Management's 2006 income tax return shows Kathy Weathers had a  
19 beginning capital account of \$0. Deft's Exh. 9 at p. 5 (Sch. K-  
20 1).<sup>10</sup> The tax return then shows that 911 Management made \$65,272  
21 in distributions to Kathy Weathers in 2006. Id. It also shows  
22 that 911 Management made \$21,348 in distributions to Club Ed, and  
23 \$53,764 in distributions to T&K Weathers, LLP. Id. at pp. 8, 11.  
24 However, the bank account records show a total of \$69,982.09 in  
25 member distributions for 2006, excluding those made for Tom

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26  
27 <sup>10</sup> The record contains no evidence that any of 911  
28 Management's members made an initial capital contribution to the  
partnership.

1 Weathers, who is not a member of 911 Management. Additionally, the  
2 bank account records show no distributions to T&K Weathers, LLP, or  
3 to Club Ed, yet the K-1s reflect distributions made to those  
4 members. The K-1s filed with plaintiff's 2006 tax return are  
5 inconsistent with the bank account records.

6 The same is true for 2007. 911 Management's 2007 tax return  
7 shows \$56,084 in member distributions to T&K Weathers, LLP in 2007,  
8 but the bank account records reveal no distributions to that  
9 member. Deft Exh. 10 at p. 5. The 2007 tax return shows \$62,899  
10 in member distributions to Kathy Weathers in 2007. Id. at p. 8.  
11 The bank account records show \$56,300 in member distributions  
12 directly to Kathy Weathers in 2007, and \$57,199 if member  
13 distributions on behalf of Tom Weathers, a non-member, are  
14 included. And, while the bank account records show no member  
15 distributions to Club Ed, the tax return shows \$24,508 in  
16 distributions to Club Ed in 2007. Id. at p. 11.

17 As noted here, no entry in 911 Management's account records  
18 shows that 911 Management made a payment recorded as a "member  
19 distribution" to Club Ed in 2006 or 2007. Rather, payments for  
20 school-related expenses or books are most often made directly to a  
21 third-party with an entry in the "memo" or "category" column  
22 referencing "Club Ed." E.g., Exh. B to Sellers Affid. at p. 33  
23 (Jan. 15, 2006 payment of \$404.13 to "Vancouver Sc....," with "Katie  
24 Weathers" noted in the memo section and "Club Ed/KATI..." noted in  
25 the category section), p. 37 (same, except date is Feb. 15, 2006),  
26 p. 46 (same, except date is May 17, 2006), p. 55 (same, except date  
27 is Aug. 15, 2006).

28 Some entries show that payment was made directly to a member

1 of the Weathers family. E.g., id. at p. 57 (Sept. 5, 2006 payment  
2 to Kayla Weathers for \$2,746.25, with "Club Ed" noted in the memo  
3 section and "Club Ed/KAYL..." noted in the category section), p. 58  
4 (Sept. 15, 2006 payment to Katie Weathers for \$251.77, with  
5 "reimbursement" noted in the memo section and "Club Ed/KATI..."  
6 noted in the category section), p. 62 (same, except date is Oct.  
7 19, 2006, and amount is \$517.59), p. 73 (Jan. 31, 2007 payment to  
8 Kayla Weathers for \$2,862.50, with "Club Ed" noted in the memo  
9 section and "Club Ed/KAYL..." noted in the category section), p.  
10 83 (May 15, 2007 payment to Katie Weathers for \$700 with "Club Ed"  
11 noted in the memo section and "Club Ed/KATI..." noted in the  
12 category section).

13 Other entries show a payment to a credit card with a reference  
14 to Club Ed. E.g., id. at p. 58 (Sept. 14, 2006 payment of \$819.88  
15 to "S Chase Card S..." with no note in the memo section but "Club  
16 Ed/KATI..." noted in the category section), p. 71 (Jan. 16, 2007  
17 payment to "S. Chase," which included \$83.51 which is noted in the  
18 category section to be "Books/Club Ed"), p. 75 (Feb. 16, 2007  
19 payment of \$315.93 to "S Chase Cardm..." with "textbooks" indicated  
20 in the memo section and "Club Ed/KAYL..." noted in the category  
21 section).

22 Defendant contends that these payments cannot be viewed as  
23 member distributions by 911 Management to Club Ed because no money  
24 ever goes to Club Ed, which, as defendant notes, does not have a  
25 bank account and does not file a federal tax return. Defendant  
26 argues that because the payments go primarily to the Weatherses, or  
27 are made to third parties on their behalf, the money is not a  
28 member distribution to Club Ed, but is income to Kathy Weathers

1 which is then used to pay personal family expenses such as tuition  
2 and books for her children.

3 911 Management argues that the money is paid to a  
4 "beneficiary," meaning a student, and is credited on 911  
5 Management's books as a member distribution for Club Ed's account  
6 pursuant to the tax code. 911 Management argues that the  
7 distributions made at Club Ed's behest are accounted for in Club  
8 Ed's capital account. But, as demonstrated below, the figures  
9 shown in the tax return establish nothing more than their presence  
10 on tax forms without adequate back-up documentation, which is not  
11 in the record. The records are poorly maintained and the amounts  
12 in the bank accounts do not equal the member distributions shown in  
13 the K-1s.

14 c. Accounts in Tom Weathers's Name

15 Some of the bills for the operational expenses of the Oregon  
16 and Washington properties are in accounts held in Tom Weathers's  
17 name. Deft Exh. 63 (Dent Depo.) at p.. 14, 15, 18. A phone bill  
18 from Qwest for the Hudson Hotel in Longview is in the name of  
19 "Thomas D. Weathers, Hudson Hotel." Id.; Deft Exh. 64. The water  
20 bill for the Kent Hotel is also in the name of Tom Weathers, but is  
21 paid by 911 Management. Id.

22 d. Summary of Recordkeeping Issues

23 As suggested at the beginning of the discussion of this  
24 factor, the question of whether the parties recorded a conveyance  
25 is inapplicable here because there is no "conveyance" of real  
26 property. Rather, the relevant question is whether the parties  
27 adhered to the formalities one would expect them to adhere to in  
28 forming 911 Management, in managing the income-producing



1 properties, in distributing income, and in paying expenses. That  
2 is, did the Weatherses observe the appropriate formalities  
3 indicating that they and 911 Management are separate entities?

4 The record shows that there inaccuracies or inconsistencies in  
5 several recordkeeping areas: (1) promissory notes; (2)  
6 characterizing the lease payments to the Oregon hotels as license  
7 fees; (3) the three-percent license fee; (4) charitable  
8 contributions; (5) member distributions; and (6) distributions to  
9 Club Ed.

10 Overall, as revealed by the discussion of this factor, 911  
11 Management's recordkeeping raises serious questions about the lack  
12 of separation between 911 Management and the Weatherses. As to the  
13 promissory notes, there is an overwhelming amount of evidence to  
14 suggest that these were not loans: the promissory notes were  
15 backdated, and most of them not formalized until after initiation  
16 of this litigation; they were typically not signed; the majority  
17 were not paid back, and payments made toward an outstanding balance  
18 typically occurred after initiation of this litigation; the  
19 transfers of money from 911 Management were to Weathers family  
20 members; and only informal handwritten notes were kept of any  
21 payments made by the recipient family members. Additionally, the  
22 amount of loans documented by the promissory notes is inconsistent  
23 with 911 Management's tax returns.

24 As to the lease payments on the Oregon hotels, the failure of  
25 proof as to the amount of income generated by the hotels means the  
26 Court cannot calculate the three-percent license fee owed to the  
27 Weatherses under the License Agreements, which in turn undermines  
28 911 Management's characterization of the lease payments, which

1 remain personal obligations of the Weatherses, as part of that  
2 license fee and as a legitimate, tax-deductible ordinary business  
3 expense for 911 Management as a license fee.

4       Additionally, Dent's assessment of living expense payments on  
5 behalf of Kathy Weathers as equal to the three-percent fee owed to  
6 the Weatherses, is informal with no regular reassessment of whether  
7 he is over- or underpaying the amount owed. The bank account  
8 records do not denote any of these expenses as a license fee and  
9 there is no explanation of how the living expenses allegedly paid  
10 as the license fee correlate to the amounts claimed as license fees  
11 in the tax returns.

12       The facts surrounding the charitable contributions indicate  
13 that these were personal contributions by Kathy and Tom Weathers  
14 which 911 Management should have recorded as a member distribution  
15 to Kathy Weathers, or to T&K Weathers, LLP (but in no event  
16 directly to Tom Weathers, as he is not a member of 911 Management),  
17 and thus income, to the Weatherses. By claiming it as one made by  
18 911 Management, 911 Management obfuscated income received by Kathy  
19 and Tom Weathers and inappropriately took a deduction for it on its  
20 own tax return.

21       The facts surrounding the membership distributions are also  
22 problematic for 911 Management. Again, Dent's assessment of how  
23 much Kathy Weathers is owed as a member of 911 Management lacks any  
24 documentation. The distributions are inconsistent with the tax  
25 returns, none are made directly to other members, and some are made  
26 on behalf of Tom Weathers, who is not a member of 911 Management.

27       Finally, the fact that some utility accounts remain in Tom  
28 Weathers's name can be viewed as an indication of the lack of

1 separation between 911 Management and Tom Weathers.

2 Overall, the summary judgment record as to 911 Management's  
3 recordkeeping overwhelmingly suggests that 911 Management kept  
4 sloppy records and now, in the face of a request to explain its  
5 practices, it offers theories and explanations which make no sense.  
6 For 911 Management to prevail on its summary judgment motion, the  
7 deposition testimony, tax returns, bank account records, and other  
8 exhibits such as the promissory notes, must show that plaintiff is  
9 a separate limited liability company whose income is its own. To  
10 survive the government's summary judgment motion, 911 Management  
11 must create an issue of fact in opposition to defendant's motion  
12 dispelling the notion that money belonging to Tom and Kathy  
13 Weathers passes through 911 Management back and forth to Tom and  
14 Kathy Weathers. The records here are insufficient for either  
15 purpose. They fail to reveal the full distribution of income and  
16 they do not show the payment of the three-percent license fee.

17 Taken together, what the records show is an entity that (1)  
18 receives income from assets which formerly produced income to Tom  
19 and Kathy Weathers, either directly (the Oregon hotels) or to T&K  
20 Weathers, LLP (the Washington properties), (2) pays the expenses  
21 associated with those assets; and (3) pays money out to Kathy  
22 Weathers, Tom Weathers, or for the benefit of Tom and Kathy  
23 Weathers and members of their family, without any support for those  
24 payments being made in amounts corresponding to the ownership  
25 interest of Kathy Weathers or T&K Weathers, LLP. 911 Management  
26 makes a half-hearted attempt to keep separate books and records to  
27 show itself as a separate entity. But, 911 Management's financial  
28 conduct is so poorly executed, so inaccurate, and so poorly

1 documented, at least in this record, that it cannot be said the  
2 money in this bank account belongs to 911 Management. Here, 911  
3 Management fails to make a showing sufficient to establish that it  
4 acts via its accounting practices, recordkeeping, and distribution  
5 of monies to its members or to its lessors or owners of the  
6 properties it manages, as a separate entity.

7           5. Whether the Transferor Retained Possession

8           The question to ask in this case is whether the Weatherses,  
9 who transferred the right to operate the Oregon and Washington  
10 properties and receive the revenue therefrom, retained control over  
11 the operation of the properties, or over 911 Management, to a  
12 degree that is inconsistent with their purported transfer and  
13 License Agreements.

14           Three facts are relevant here. First, the Weatherses retain  
15 control over the income-producing real property by virtue of being  
16 the lessees of the Oregon hotels and the owners of the Washington  
17 properties (via T&K Weathers, LLP, for which Tom Weathers makes all  
18 decisions).

19           Second, as to the day-to-day management of the properties, and  
20 thus the income produced by the properties, Tom and Kathy Weathers  
21 have, as previously explained, a significant interest in 911  
22 Management, even without regard to Club Ed. Tom Weathers hired  
23 Dent, a longtime friend and godfather to his children, to run 911  
24 Management. 911 Management's Operating Agreement requires that the  
25 hiring of 911 Management's manager be by unanimous consent of the  
26 members of 911 Management. Deft Exh. 8 at p. 4. Tom Weathers's  
27 single-handed hiring of Dent as manager violates the Operating  
28 Agreement, suggesting that the unanimous consent provision is

1 illusory and further suggesting Tom Weathers's inclination to  
2 disregard the separate entity created by the Operating Agreement.  
3 Dent meets with Tom Weathers about once each month. Additionally,  
4 the Operating Agreement allows Dent to be fired without unanimous  
5 consent<sup>11</sup>, and thus, by Tom and Kathy Weathers, without cause.  
6 Accordingly, while the Operating Agreement provides that 911  
7 Management's manager (Dent) has control of 911 Management's affairs  
8 and control of 911 Management's bank account, the evidence  
9 demonstrates that the Weatherses have control and power over Dent.

10 Third, the written License Agreements give Tom and Kathy  
11 Weathers the unilateral right to terminate the agreements under  
12 which 911 Management obtains the revenue to the hotels. No  
13 reciprocal termination provision is given to 911 Management. There  
14 is no evidence regarding termination of the oral agreements  
15 pertaining to the Washington properties.

16 The evidence demonstrates that the Weatherses, as transferors  
17 of the right to operate the Oregon hotels and Washington  
18

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19 <sup>11</sup> Contrary to 911 Management's argument, firing the  
20 manager is not one of the actions listed in the Operating  
21 Agreement as requiring unanimous consent of the members. Deft  
22 Exh. 8. The term of office of the manager states that the  
23 manager shall serve until the earliest of a breach of duty as  
24 specified, or until removal of such manager. Id. There is no  
25 further mention in the Operating Agreement about removal of a  
26 manager or a breach of duty. Without anything more specific in  
27 the Operating Agreement, the manager may be removed by a vote of  
28 members with a majority interest in 911 Management. Wash. Rev.  
Code § 25.15.150(2). Through T&K Weathers, LLP, and Kathy  
Weathers, Tom and Kathy Weathers have a sixty-percent interest in  
911 Management, and thus, Dent is subject to their control and  
they may remove him from this position. Moreover, as expressed  
above, Jeff Townley appears to simply follow Dent's  
recommendations in terms of Club Ed's expenditures and it is  
doubtful that Club Ed is truly a separate entity.

1 properties, and thus to receive the revenue therefrom, retained the  
2 right to control the properties and 911 Management. This factor  
3 weighs in favor of the government.

4 6. Whether the Transferor Continues to Enjoy the  
5 Benefit of the Transferred Property

6 For this factor, the appropriate question is whether the  
7 Weatherses continue to receive, in some manner, the revenue  
8 generated by the properties even after they transferred away the  
9 right to that revenue. Many of the facts previously discussed are  
10 relevant here. The written License Agreements provide Tom and  
11 Kathy Weathers with three-percent of the gross revenue of the  
12 Oregon hotels. And, because Dent pays all of Kathy Weathers's  
13 living expenses directly without keeping track of how such sums  
14 relate to the three-percent fee owed to the Weatherses, it is  
15 possible that the Weatherses enjoy the benefit of more than the  
16 three-percent they are entitled to under the License Agreements.  
17 Tom and Kathy Weathers also receive a benefit each time 911  
18 Management makes a mortgage payment on the Washington properties on  
19 behalf of T&K Weathers, LLP.

20 Next, Kathy Weathers receives \$5,000 to \$5,700 per month, in  
21 cash, from 911 Management as a "member distribution." The majority  
22 of the payments made on behalf of Club Ed have gone directly to pay  
23 tuition and school expenses for Katie and Kayla Weathers. Thus,  
24 under the License Agreements for the Oregon properties, the oral  
25 agreements for the Washington properties, and the "member  
26 distributions" by 911 Management, the Weatherses receive  
27 substantial income generated by the properties.

28 There are also payments made by 911 Management on Tom

1 Weathers's behalf that do not appear to be either the three-percent  
2 license fee, a member distribution, or a payment of a mortgage for  
3 the Washington property. E.g., Exh. B to Sellers Affid. at p. 34  
4 (\$27.78 payment on Jan. 20, 2006 for "PHONE/TKW"), p. 44 (\$1,000  
5 payment on April 25, 2006, for arbitration award); Deft Exh. 22  
6 (copy of check for arbitration award which references "Tom  
7 Weathers," "Kent Hotel Arbitration" in memo section). Tom Weathers  
8 "enjoys the benefit" of the income produced by the properties every  
9 time 911 Management pays an obligation he owes.

10 911 Management admits that its sole source of income is  
11 derived from the rental of the Oregon and Washington properties.  
12 But for the creation of 911 Management by the Weatherses, and the  
13 agreements between the Weatherses and 911 Management regarding the  
14 operation of these properties, the income produced by the  
15 properties would be going directly to the Weatherses (for the  
16 Oregon hotels), or directly to T&K Weathers, LLP (with Tom and  
17 Kathy Weathers as general partners). The income generated by the  
18 properties is initially paid to 911 Management, but it still ends  
19 up in the hands of the Weathers family either via the License  
20 Agreements, the cash membership distributions paid to Kathy  
21 Weathers, or the payments made on the Weatherses' behalf for a host  
22 of obligations they carry. Some of the income goes to their  
23 children. The Weatherses still enjoy the benefits of the  
24 "transferred property," meaning the income generated by the  
25 properties they lease or own.

26 7. The Source of the Funds Used to Purchase the  
27 Property

28 This factor is not relevant to the facts presented here.

1           8.   The Taxpayer's Continued Use of the Property  
2               Without Payment of Fair Rental Value

3           This factor is not relevant to the facts presented here.

4           9.   The Taxpayer's (Tom and Kathy Weatherses') Continued Payment of Maintenance Charges and  
5               Real Estate Taxes

6           911 Management appears to pay all of the operational expenses  
7 of the properties, including the rent owed by Kathy and Tom  
8 Weathers as the lessees of the Oregon hotels, and the mortgage  
9 payments owed by T&K Weathers, LLP, on the Washington properties.  
10 Because 911 Management, and not taxpayers Tom and Kathy Weathers,  
11 make these payments, this factor favors 911 Management.

12          10. The Taxpayer's Acts of Holding Himself Out as  
13               the Owner of the Property

14          In March 2008, Tom Weathers wrote a letter to the lawyer for  
15 D.Z. Real Estate regarding to the lease re-negotiations for the  
16 Joyce Hotel. Deft Exh. 32. In the letter, Tom Weathers states  
17 that DZ Real Estate had threatened to lock "us" out, and had  
18 threatened to "prevent us from operating our company at the  
19 property located at 322 SW 11th Ave." Id. He further states that  
20 "[y]ou are aware that we have operated as a holdover . . . ." Id.  
21 Tom Weathers refers to the "name, equipment, phones, phone numbers,  
22 [and] operating contracts" as "my property." Id. He again refers  
23 to the business as "our" operation. Id.

24          Even though Tom & Kathy Weathers are the lessees of the Joyce  
25 Hotel, and thus, Tom Weathers's direct involvement in the re-  
26 negotiation of a lease does not raise suspicion, his repeated  
27 inclusion of himself as part of the business that operates the  
28 Joyce Hotel shows that he considers himself to be 911 Management,  
or an instrumental part of 911 Management. This factor may



1 slightly weigh in favor of the government, but overall, it is of  
2 little importance given that Tom Weathers remains a lessee in  
3 regard to the property.

4 B. Nominee Analysis

5 In the nominee analysis, the issue is whether the alleged  
6 nominee holds an asset for the taxpayer while the taxpayer actually  
7 exerts control over the asset. The factors articulated in Towe and  
8 Colby B. are tools used to determine the amount of control the  
9 delinquent taxpayer has over an asset.

10 With the exception of whether Dent or Jeff Townley is the  
11 final decisionmaker for Club Ed distributions, and thus, Club Ed  
12 membership, the facts in this case are undisputed. The parties  
13 agree that the issues are capable of resolution on summary  
14 judgment.

15 As discussed above, even construing the facts in 911  
16 Management's favor, the evidence shows that (1) 911 Management was  
17 created in anticipation of liabilities, (2) the Weatherses and 911  
18 Management have a close relationship, (3) 911 Management maintains  
19 questionable account records and engages in questionable conduct in  
20 handling different categories of payments, suggesting that the  
21 Weatherses do not treat 911 Management as a distinct entity, (4)  
22 the Weatherses retained significant control over 911 Management,  
23 (5) the Weatherses continued to enjoy the benefit of the income  
24 produced by the properties, and (6) Tom Weathers has held himself  
25 out as being part of 911 Management.

26 911 Management cannot prevail on its motion for summary  
27 judgment given the complete failure of evidence demonstrating that  
28 it is a separate entity. Based on the entire preceding discussion

1 of the ten factors, the evidence in the record is such that, even  
2 construing the evidence and the inferences therefrom in a light  
3 most favorable to 911 Management, all reasonable jurors would  
4 conclude that 911 Management is not an entity separate from the  
5 Weatherses and thus, that 911 Management is the nominee of Tom and  
6 Kathy Weathers.

7 I recommend that defendant's motion be granted on the issue of  
8 whether 911 Management is the nominee of the Weatherses, and that  
9 911 Management's motion be denied.

10 C. Alter Ego

11 The factors used to determine if an entity is the alter ego of  
12 the delinquent taxpayer are set out above. Generally, the issue in  
13 the alter ego analysis is whether the domination or control by the  
14 taxpayer is so extensive that it negates any separate entity  
15 distinction. The control must be active and substantial.

16 Neither party adds significant, separate discussion regarding  
17 the alter ego issue. Many of the factors overlap with the nominee  
18 analysis and the parties primarily rely on their nominee-related  
19 arguments.

20 As noted above, the Weatherses maintain significant control  
21 over 911 Management. They use 911 Management to shield themselves  
22 from liability for payment of their income taxes. As a result,  
23 they use 911 Management for their own financial benefit. As for  
24 mingling affairs, there is substantial evidence showing that the  
25 Weatherses ignore 911 Management's status as a separate entity.  
26 Finally, although the Weatherses rely on Dent to actually operate  
27 911 Management, they retain the ability to fire him. While Dent's  
28 managerial role somewhat mutes the Weatherses' control over day to

1 day management of 911 Management, the fact that they, as majority  
2 members of 911 Management, can terminate Dent without cause,  
3 indicates that they retain control over his decisionmaking.  
4 Further, Dent pays whatever the Weatherses tell him to pay without  
5 regard to whether the payments exceed what the Weatherses are  
6 entitled to receive. Indeed, it is difficult to see Tom Weathers's  
7 entitlement to any payments on his behalf, yet he has received  
8 some.

9 On balance, the evidence, construed in the light most  
10 favorable to 911 Management, shows that 911 Management is the alter  
11 ego of the Weatherses. I recommend that defendant's motion be  
12 granted on the alter ego issue and that 911 Management's motion be  
13 denied.

#### 14 D. Propriety of the IRS in Conducting the Levy

15 As noted above, 911 Management contends in its fourth claim  
16 that the IRS was required to issue a notice of deficiency and a  
17 notice of intent to collect levy, to 911 Management, and not just  
18 to the taxpayers. 911 Management's motion for summary judgment  
19 appears to seek summary judgment on all of its claims, but 911  
20 Management fails to mention this claim in its motion or in  
21 opposition to defendant's motion.

22 The law allows the IRS to collect the unpaid taxes of a  
23 taxpayer by levying on property held by third parties that are  
24 nominees, alter-egos, or transferees of a taxpayer. G.M. Leasing  
25 Corp. v. United States, 429 U.S. 338, 350-51 (1977); Al-Kim, Inc.  
26 v. United States, 650 F.2d 944, 947 (9th Cir. 1979).

27 Third parties are not required to receive notice of a bank  
28 account levy. E.g., Miller v. United States, 955 F. Supp. 795, 800

(N.D. Ohio 1996) ("service of notice need not be made upon potential third party owners to satisfy the notice provisions of the federal tax law.") (internal quotation omitted); see also Douglas v. United States, 562 F. Supp. 593 (S.D. Ga. 1983) (in levying bank account, notice to bank as the possessor of the money in the account, was sufficient and notice was not required to nontaxpayer account co-holder); 26 C.F.R. § 301.6320-1(b)(2)Q-B5 (treasury regulation explaining notice requirements and in question and answer format, stating that the nominee is not entitled to "CDP" (Collection Due Process) hearing, following notice of federal tax lien, because the nominee is not the person who has refused to pay the tax owing); Sullivan v. Saenger, 152 Or. App. 46, 54, 952 P.2d 95, 99-100 (1998) (IRS did not need to provide notice regarding property seizure to alter ego because alter ego was, essentially, identical to the taxpayer, or stood in the shoes of the taxpayer, and thus, notice to the taxpayer alone was sufficient).

911 Management provides no law to support its position that the IRS was required to notify 911 Management of the Weatherses' tax deficiency and the IRS's intent to levy 911 Management's bank account. The law supports awarding summary judgment to defendant on 911 Management's fourth claim.

### III. Motion to Strike

911 Management moves to strike all, or part, thirty-two separate paragraphs contained in defendant's CSF filed in support of defendant's summary judgment motion, and all references to those alleged facts in defendant's motion and supporting memorandum. I address 911 Management's arguments by the type of objection.

1           A. No Support in the Record

2           911 Management moves to strike paragraphs 26, 38, 40, 41  
3 (first sentence only), 83, 86, and 87 (first sentence only) of  
4 defendant's CSF on the basis that the factual allegations are  
5 without support in the record.

6                   a. Paragraph 26

7           "911 Management LLC, was formed on October 25, 2005, 11 days  
8 after Thomas Weathers was sentenced in this criminal tax case."  
9 Deft's CSF at ¶ 26. I deny the motion. Defendant cites to 911  
10 Management's application to form a limited liability company, which  
11 contains the October 25, 2005 date. In a different part of the  
12 CSF, defendant cites to Tom Weathers's criminal judgment which  
13 reveals the date of sentencing.

14                   b. Paragraph 38

15           "Bruce Carroll, who was or is Thomas Weathers cell-mate in  
16 federal prison has 'received benefits' from Club Ed." I deny the  
17 motion. Dent's cited deposition testimony supports the assertion.

18                   c. Paragraph 40

19           "The gross receipts reported on 911 Management's 2006 and 2007  
20 federal returns include amounts received by 911 Management based on  
21 the 'License Agreements' that relate to the Weathers' leases to  
22 operate the Joyce and Kent Hotels." While I agree with 911  
23 Management that defendant's citation to the License Agreements  
24 themselves does not support the assertion that the reported gross  
25 receipts listed on the tax returns included amounts based on the  
26 License Agreements that relate to the Oregon hotels, I deny the  
27 motion because 911 Management itself asserts in its CSF in support  
28 of its motion for summary judgment, that its sole source of income

1 is the rental of the Oregon hotels and the Washington properties.  
2 Pltff's CSF at ¶ 31 (citing to Dent Feb. 20, 2009 Affid. at ¶ 5).  
3 This objection is pointless.

4 d. Paragraph 41 (first sentence only)

5 "The gross receipts reported on 911 Management's 2006 and 2007  
6 federal returns also include amounts 911 Management received due to  
7 its purported management of the real properties in Longview,  
8 Washington and Kelso, Washington." I agree with 911 Management  
9 that the cited deposition excerpts do not appear to mention the  
10 source of the revenue on the tax returns. However, as with the  
11 previous objection to paragraph 40 of defendant's CSF, 911  
12 Management itself asserts that its sole source of income is the  
13 rental of the Oregon hotels and Washington properties. Moreover,  
14 911 Management also asserts in its own CSF that it had "verbal"  
15 agreements<sup>12</sup> with the Weathers to operate the Washington properties.  
16 Finally, this Court, in reviewing an asserted fact in a CSF,  
17 routinely makes no reference to surplus verbiage such as the word  
18 "purport." I deny the motion.

19 e. Paragraph 83

20 "The Weathers purport to permit 911 Management to operate the  
21 real properties they own in Longview, Washington and Kelso,  
22 Washington." Because the cited evidence by defendant supports this  
23 assertion, I can only assume that 911 Management objects to the use  
24 of the word "purport." For the reason explained in the preceding  
25

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26 <sup>12</sup> I assume 911 Management means it had an oral agreement  
27 with the Weatherses. "Verbal" refers to the use of words,  
28 whether written or oral. Bryan A. Garner, A Dictionary of Modern  
Legal Usage 910-11 (2d ed. 1995).

1 paragraph, I deny the motion.

2 f. Paragraph 86

3 "Dent has deposited funds due to 911 Management into the bank  
4 of another entity (*i.e.*, 411 Services, LLC), to foil IRS collection  
5 efforts and Dent signed a document on behalf of 911 Management and  
6 411 Services, LLC, purporting to make 411 Services a fiduciary of  
7 911 Management." Because I do not rely on the evidence underlying  
8 this asserted fact in resolving the motions, I deny the motion as  
9 moot.

10 g. Paragraph 87

11 "Dan Dent sent Jeff Townley an e-mail on January 30, 2008  
12 which stated that, 'to get all of our ducks in order' in light of  
13 the pending case with the United States, Dent would 'need'  
14 promissory notes for certain purported loans that had already been  
15 made." I deny the motion because the cited evidence generally  
16 supports the assertion and although defendant slightly changed the  
17 language in the email, I relied solely on the email itself, not  
18 defendant's articulation of it.

19 B. Argumentative, Unsupported, and Immaterial

20 911 Management moves to strike the following paragraphs in  
21 defendant's CSF: 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22,  
22 23, 24, 25, 28, 32, 44, 63, 64, 65, 66, and 67 because the asserted  
23 facts are allegedly argumentative, unsupported, and immaterial.

24 Because of the number of paragraphs involved, I do not quote  
25 them all here. Generally, the assertions in these paragraphs  
26 address background facts about the Weatherses, including (1) facts  
27 regarding the rents received on the properties they owned in 1993  
28 through 1996 as reflected in their tax returns for those years;

1 Deft's CSF at ¶¶ 10, 11; (2) facts about their amended return for  
2 1996 and statements made to the IRS about whether they owed tax for  
3 that year; Deft's CSF at ¶¶ 12, 14, 15; (3) facts regarding the  
4 criminal indictment, the superseding indictment, the convictions,  
5 the sentences received by Kathy and Tom Weathers; Deft's CSF at ¶¶  
6 16-23; (4) facts as to Kathy Weathers's probation violation in  
7 2007; Deft's CSF at ¶¶ 25-26; (5) certain facts about 911  
8 Management's formation; Deft's CSF at ¶ 26; (6) certain facts about  
9 Bryce Townley's involvement in 911 Management's formation and his  
10 litigation in an unrelated case involving transfers of property to  
11 an alter ego/nominee; Deft's CSF at ¶¶ 27, 28; (7) facts as to the  
12 limited partners of T&K Weathers, LLP; Deft's CSF at ¶ 32; (8) the  
13 fact Dent visits Tom Weathers in prison about once each month;  
14 Deft's CSF at ¶ 44; (9) facts regarding correspondence between Tom  
15 Weathers or Dent and the real estate attorney for D.Z. Real Estate  
16 regarding the Joyce Hotel; Deft's CSF at ¶¶ 63-66; and (10) the  
17 fact that Dent allegedly acted as an intermediary for Tom Weathers  
18 regarding the Joyce Hotel Lease negotiations. Deft's CSF at ¶ 67.

19 I deny the motion as to the following paragraphs because the  
20 evidence cited in support of the asserted facts is material to the  
21 disposition of the motions, the asserted fact is sufficiently  
22 supported, and the Court has ignored any language in the assertion  
23 that is not the fact itself: Paragraphs 10-12, 14, 17-20, 22, 23,  
24 26, 27, 32, 44, 63, 64. I deny the motion as moot as to the  
25 following paragraphs because I did not rely on the cited evidence  
26 in resolving the motions: 15, 16, 21, 24, 25, 28, 65-67.

27 C. Redundant, Immaterial, Impertinent, or Scandalous

28 911 Management moves to strike the following paragraphs of

64 - FINDINGS & RECOMMENDATION/ORDER



1 defendant's CSF because, according to 911 Management, these  
2 assertions are not relevant to the issues raised in the motions and  
3 are offered solely for the purpose of disparaging the Weatherses  
4 and through affiliation with the Weatherses, 911 Management: 14-  
5 16, 24, 28, and 62.

6 The only paragraph not previously addressed is paragraph 62.  
7 There, defendant makes an assertion regarding a net worth statement  
8 submitted by Kathy Weathers as part of her probation. I deny the  
9 motion as moot because I did not rely on the underlying evidence in  
10 resolving the motions.

11 D. Not Produced in Discovery

12 Plaintiff challenges the facts asserted in paragraphs 28 and  
13 73 of defendant's CSF because the underlying evidence was not  
14 produced in discovery. I have already addressed paragraph 28.  
15 Paragraph 73 asserts that Jeff Townley was previously adjudged in  
16 an unrelated civil case to be a nominee of a taxpayer. I deny the  
17 motion as moot because I did not rely on the underlying evidence in  
18 resolving the motion.

19 Finally, the Court admonishes 911 Management and its counsel  
20 that a motion to strike is not properly addressed to statements by  
21 counsel, meaning assertions of fact in a CSF or arguments made in  
22 a memorandum of law. Motions to strike in the summary judgment  
23 context should be directed to the actual evidence, as there is no  
24 basis to strike a lawyer's description of the facts contained in a  
25 CSF assertion or to strike a lawyer's argument in support of an  
26 inference the lawyer wishes the Court to draw. Motions directed to  
27 a CSF assertion or to an argument about the meaning of a fact are  
28 a waste of the Court's time.

## 1 CONCLUSION

2 Defendant's motion for summary judgment (#52) should be  
3 granted. 911 Management's motion for summary judgment (#57) should  
4 be denied. 911 Management's motion to strike (#71) is denied in  
5 part and denied as moot in part.

## 6 SCHEDULING ORDER

7 The Findings and Recommendation will be referred to a district  
8 judge. Objections, if any, are due September 8, 2009. If no  
9 objections are filed, then the Findings and Recommendation will go  
10 under advisement on that date.

11 If objections are filed, then a response is due September 22,  
12 2009. When the response is due or filed, whichever date is  
13 earlier, the Findings and Recommendation will go under advisement.

14 IT IS SO ORDERED.

15 Dated this 24th day of August, 2009.

16  
17  
18 /s/ Dennis James Hubel  
19 \_\_\_\_\_  
Dennis James Hubel  
United States Magistrate Judge  
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